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# AT THE ORIGINS OF LAW AND THE STATE: SUPERVISION OF VIOLENCE, MUTILATION OF BODIES, OR SETTING OF PRICES?

JAMES Q. WHITMAN\*

In this Article, I would like to air some doubts about our dominant model of the origins of law and the state—what legal historians often call the “self-help” model. The self-help model is widely believed to offer a complete and adequate explanation of the origins and early development of law, and it comes close to being our standard model for explaining all periods in the development of the law.<sup>1</sup> Nevertheless, I am going to argue that it is significantly flawed. In particular, I am going to try to show that the self-help model rests on a serious misinterpretation of two prominent themes in our archaic sources: the mutilation of bodies and the setting of prices.

Omitting much subtle detail, the self-help model can be fairly described in a few swift strokes. It is intended to solve the same problem that the social contract model of the Enlightenment was intended to solve: the problem of the earliest stages in the development of law and the state. But the self-help model takes an approach to that problem that is markedly different from the approach that the social contract theorists took. The classic social contract model of the Enlightenment, as we all know, proposed that the early state formed when human beings joined together to clamp down, in a civilized way, on the disorderly and chaotic violence of the state of nature. The scholars who developed the self-help model were reacting against this standard Enlightenment approach; and they took a different view both of the state of nature, and of the character of the early state. The makers of the self-help model agreed with the social contract theorists in assuming that there had been some sort of state of nature in which vio-

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1. See *infra* notes 3-11, 120 and accompanying text.

lence was prevalent. But they did not accept the proposition that the violence of this state of nature had been disorderly and chaotic. On the contrary: They maintained that the violence of the state of nature had a kind of spontaneous order, founded in the systematic organization of vengeance. Moreover, they denied that the early state made any effort, at first, to eliminate the ordered vengeance-violence of the state of nature. On the contrary: They argued that the early state arose in the effort to *supervise* and *institutionalize* the violence of the state of nature rather than to eliminate it.

Thus, the self-help model that these scholars developed postulates, in its most common version, four fundamental stages in the early development of law and the state. Stage one is the stage of the state of nature. This is a stage of ordered vengeance and vendetta. In this first stage, clans and/or individuals exact vengeance, in a systematic and rule-governed way, when injured by other clans and/or individuals; in particular, they exact *talionic* vengeance, seeking, in the famous biblical phrase, "an eye for an eye, a tooth for a tooth." In stage two, the early state emerges. This early state does not, however, attempt to prevent violence. Rather, it sets out to supervise the existing system of vengeance. Thus, the early state assumes a kind of licensing power over acts of talionic vengeance, requiring that injured parties seek formal state sanction before avenging themselves. In stage three, the early state itself begins to function as enforcer, taking vengeance on behalf of injured clans; in Weber's phrase, the early state of stage three monopolizes the legitimate use of violence. Only in stage four does the early state at last move to eliminate private violence. In this fourth stage, the early state institutes a system of "compositions," substituting money damages for talionic vengeance.

This self-help model has collected some imposing authority over the last couple of centuries. It was articulated and embraced, with variations, by some of the greatest names in the history of legal scholarship, including Rudolf von Jhering<sup>2</sup> and Max Weber.<sup>3</sup> It has been applied to explain the rise of legal systems all over the early civilized world, from Mesopotamia,<sup>4</sup> to Greece,<sup>5</sup> to Rome,<sup>6</sup> to the Teutonic for-

2. See *infra* notes 100-06 and accompanying text.

3. See, e.g., MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISSE DER VERSTEHENDEN SOZIOLOGIE* 516 (5th ed. 1976).

4. 1 HAMMURABI, KING OF BABYLONIA, *THE BABYLONIAN LAWS* 60 (G.R. Driver & John C. Miles eds., 1952).

5. GUSTAVE GLOTZ, *LA SOLIDARITÉ DE LA FAMILLE DANS LE DROIT CRIMINEL EN GRÈCE* 237 (1973) (1904).

6. See *infra* text accompanying notes 10, 100-06, 120.

ests,<sup>7</sup> to early Islam,<sup>8</sup> and to Europe of the central and later Middle Ages.<sup>9</sup> It remains very nearly unanimously endorsed by the literature of archaic law, especially in the literature in English and German, being described by J.M. Kelly, for example, as "the only plausible reconstruction."<sup>10</sup> It is a model, moreover, that has had great influence even outside the realm of archaic law: As I have elsewhere shown, it was from the self-help model that Weber derived his "monopoly of violence" model for the nature and function of the modern state.<sup>11</sup>

Nevertheless, scattered and uncoordinated criticisms have been offered by scholars in a variety of specialties. Particularly thoroughgoing critiques have been mounted by the French tradition of Roman law scholarship represented by Lévy-Bruhl and Noailles,<sup>12</sup> and by the German tradition of Germanic-law scholarship represented by Karl von Amira.<sup>13</sup> Doubts have also been expressed by anglophone assyriologists like A.S. Diamond and Raymond Westbrook;<sup>14</sup> by a few other leading historians of Roman law, including Geoffrey MacCormack;<sup>15</sup> as well as by David Cohen, the historian of Greek law.<sup>16</sup> The model has also attracted a bit of offhand criticism from no less a figure than Friedrich Nietzsche, although Nietzsche's views cannot be said to have established themselves in the literature.<sup>17</sup>

In this Article, I would like to add my voice to this disjointed chorus of complaint. My goal is not to show that the self-help model is completely wrong. Some sort of vengeance or vendetta system *must* lie somewhere in the background of our earliest sources; the evidence for the partial truth of the model is too powerful to be thrown out. But the truth that the model has, I will try to show, is only partial.

7. See, e.g., 1 HERMANN CONRAD, *DEUTSCHE RECHTSGESCHICHTE* 66 (1954); *infra* notes 88-96 and accompanying text.

8. See, e.g., 1 L. GÜNTHER, *DIE IDEE DER WIEDERVERGELTUNG: DIE KULTURVÖLKER DES ALTERTUMS UND DAS DEUTSCHE STRAFRECHT BIS ZUR CAROLINA* 63 (1889).

9. See, e.g., OTTO BRUNNER, *LAND UND HERRSCHAFT, GRUNDFRAGEN DER TERRITORIAL-ALLEN VERFASSUNGSGESCHICHTE SÜDOSTDEUTSCHLANDS IM MITTELALTER* 17 (4th ed. 1959).

10. J.M. KELLY, *ROMAN LITIGATION* 2 (1966). For a "moderate" German language version, see F. WIEACKER, *RÖMISCHE RECHTSGESCHICHTE* 251 (1988).

11. See James Whitman, *Aux Origines du 'Monopole de la Violence,'* Address Before the École Normale Supérieure, Fontenay-St. Cloud (Jan. 21, 1995).

12. See *infra* notes 130-32 and accompanying text.

13. See *infra* notes 133-36 and accompanying text. Some recent German scholars have also begun to raise doubts. See the treatment of HANS HATTENHAUER, *EUROPÄISCHE RECHTSGESCHICHTE* 15-21, 783 (2d ed. 1994); see also Hermann Nehlsen, *Entstehung des öffentlichen Strafrechts bei den germanischen Stämmen*, in *GERICHTSLAUBEN-VORTRÄGE* 3, 3-16 (K. Kroeschell ed., 1983).

14. See *infra* notes 122-23 and accompanying text.

15. See *infra* note 121 and accompanying text.

16. See *infra* note 125 and accompanying text.

17. See *infra* note 157 and accompanying text.

For our sources, viewed with a clear eye, cannot be satisfactorily explained by the self-help model. The scholars who built the model, I will try to show, built it on a blinkered and sharply limited account of the evidence. For while it is true that our principal sources, which are archaic "codes" of the type of the Laws of Hammurabi or of the Twelve Tables, regulate vengeance, they regulate much more as well. In particular, I will suggest that the scholars who developed the self-help model never recognized two salient and very difficult problems in the interpretation of these sources: the problem of the meaning and function of body mutilation, and the problem of the meaning and function of weighed metal and money. Yet even a cursory comparative look at the sources suggests that both of these problems need steady attention before we can be satisfied with our interpretations.

I will take two tacks in mounting my argument. On the one hand, I will offer a rapid comparative overview of sources in a wide variety of traditions, pointing out what seems to be the striking prevalence of concerns over mutilation and price-setting. Like any such comparative overview, of course, this will only raise questions, not answer them. Only much more detailed study of particular traditions and institutions could provide solutions to the problems that I identify.

Alongside this comparative overview, however, I will also offer, at the heart of this Article, a bit of intellectual history. I will try to lay bare the weaknesses in the self-help theory by showing how the theory developed.<sup>18</sup> I will argue that from the beginning, the self-help theory took a partial and distorted view of its sources. I will start by tracing the self-help theory to the work of the eighteenth-century biblical scholar J.D. Michaelis, in whose writing we can see the transition from the social contract model to the self-help model—and in whose writing we also can see how a focus on biblical talion led to a fatefully limited approach to the sources. I will then turn to the development of the theory in the writings of the nineteenth century. In particular, I will try to show that nineteenth-century versions of the self-help model betray the strong, and suspect, influence of one figure: G.W.F. Hegel. Hegel, indeed, will be the principal villain of this paper; I will try to show that his influence had two pernicious effects on our schol-

18. For the idea that the history of the development of the self-help theory raises doubts about its validity, see G. BROGGINI, *Vindex und Iudex. Zum Ursprung des römischen Zivilprozesses*, in ZEITSCHRIFT DER SAVIGNY STIFTUNG FÜR RECHTSGESCHICHTE 76, 116 (1959) (attributing the model to the influence of Enlightenment social contract ideas); Nehlsen, *supra* note 13, at 16 (attributing the model to turn-of-century criminal law doctrine developed from Nordic sources). My account should show that there is some truth in both of these contentions, but that the tale is a more complex one than either suggests.

arship. First, Hegel's influence led nineteenth-century legal historians to focus too heavily on the talionic rule of "eye for an eye, tooth for a tooth." To Hegel, who was deeply concerned with Christian theology, the guiding problem posed by early legal history was the problem of the transition from an Old-Testament rule of "eye for an eye, tooth for a tooth," to the new covenant of Christ. Accordingly, Hegelian-style legal history always analyzed archaic sources in terms of "eye for an eye, tooth for a tooth," with its apparent ethic of vengeance. Second, Hegel's influence led nineteenth-century legal historians to focus far too much on the problem of the evolution of subjective legal consciousness, to the exclusion of the problem of the nature and goals of the early state. As a consequence, the nineteenth-century tradition neglected hard and central questions about the authorities that produced our early "codes." The nineteenth-century tradition, with its problematic Hegelian influence, has remained powerfully influential in our field, I will show, to this day.

Finally, in the last sections of the Article I will review some of the doubts that have been voiced about the self-help model by its few critics, and offer some general suggestions of my own about directions for research.

## I

Let us begin by taking a broad comparative look at the sources. The self-help model was built primarily (though not exclusively) on the interpretation of what I am going to call (despite obvious inconveniences in both terms) "archaic"<sup>19</sup> "codes":<sup>20</sup> the Germanic "barbarian codes," the Twelve Tables of Roman Law, the "Book of the Covenant" preserved in Exodus, the ancient Near Eastern Codes, and a number of others. This material derives from a startling variety of times and places, and our first and most natural instinct may be to feel skeptical that it can all be meaningfully brought together under any single rubric. Nevertheless, it is easy to see why the scholars who developed the self-help model felt confident that they could draw comparatively on this widely scattered body of material: These archaic codes do indeed show some remarkable uniformities across early cultures. In particular, they tend to display two different kinds of regulation, both strikingly widespread, upon which I would like to focus:

19. This rubric is simply a convenient one for gathering a great deal of very old material in a comparative survey without asserting that all of that material somehow necessarily displays the same universally archaic features.

20. See *infra* note 64; *infra* text accompanying notes 105-06.

regulation involving what we may call "mutilation and mutilation penalties"; and regulation involving money penalties. Following a comparative tradition that dates far back into the nineteenth century, then, I am going to try to show that these forms of regulation appear in a startlingly diverse range of traditions.

### A. Mutilation

The first of the two widespread types of archaic regulation I will discuss involves bodily mutilation. As many scholars have noted, pre-modern law very frequently displays a great concern with the mutilation of bodies, and more especially a tendency to penalize through mutilation.<sup>21</sup> In particular, the codes often call for talionic maiming. Alongside "eye for an eye, tooth for a tooth,"<sup>22</sup> the most familiar of these talionic maiming regulations, is a famous provision from the Twelve Tables, the Roman enactment of the mid-fifth century B.C., which reads:

8, 2. If a person has maimed another's limb, let there be retaliation in kind, unless he makes agreement for composition with him.<sup>23</sup>

This provision is typical of much talionic regulation in leaving unclear who it is who is to exact the talionic penalty: the injured party? the state? Similarly famous bits of talionic maiming, though from a source that more clearly assigns the power of maiming to the state, come from the Laws of Hammurabi, Mesopotamian material more than a thousand years older than the Twelve Tables:

§ 196. If an *awilu* [a person of uncertain, but clearly relatively high, social status] should blind the eye of another *awilu*, they shall blind his eye.

§ 197. If he should break the bone of another *awilu*, they shall break his bone.<sup>24</sup>

There are also many other less famous examples of what seem to be talionic mutilation, from ancient Egypt through early Islam, through some (though only a few) of the Germanic barbarian traditions.<sup>25</sup>

21. See, e.g., W. Schild, *Verstümmelungsstrafen*, in *HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE* cols. 833-36 (A. Erler et al. eds., 1993).

22. *Exodus* 21: 23-25.

23. 1 *FONTES IURIS ROMANI ANTEJUSTINIANI* 53 (Salvatore Riccobono et al. eds., 1968) [hereinafter *FONTES*].

24. MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 71, ¶¶ 196-97, at 121 (1995).

25. Still very useful as a collection of these is the work of I GÜNTHER, *supra* note 8. For the relative paucity of talion in Germanic law, see *id.* at 181-82, with citations to further literature. I leave to the side here the question of whether the talionic provisions we see in the Germanic sources reflect Christian influence.

Such talionic mutilation looms very large indeed in our sources. But, it is important to emphasize immediately that talionic mutilation represents only a *sub-category* of the treatment of mutilation and bodily violence in the archaic codes. This is partly because many of the sources display mutilation penalties that are not talionic. Indeed, it is one of the most familiar facts about pre-modern law of all periods that it makes heavy use of mutilation penalties.<sup>26</sup> We may take an example once again from the Laws of Hammurabi:

§ 195. If a child should strike his father, they shall cut off his hand.<sup>27</sup>

The non-talionic severing of hands and feet,<sup>28</sup> the branding of the face,<sup>29</sup> the cutting of hair,<sup>30</sup> and like mutilation of body parts is also to be found in the widest variety of early legal systems, including, for example, Islamic,<sup>31</sup> and so it seems, ancient Indian law.<sup>32</sup> Some of these mutilation penalties seem to be sympathetic in character, presupposing some kind of harmonic relationship between the body part to be mutilated and the wrong committed. Such, for example, is the Middle Assyrian regulation that calls for slicing off the lower lip of a man who kisses a woman.<sup>33</sup> Non-talionic mutilation penalties are perhaps also to be found in the early Roman law of the Twelve Tables, though to say so raises some difficult questions of interpretation.<sup>34</sup> Wandering further afield, moreover, we may note that Qin law, Chi-

26. William I. Miller, *Getting a Fix on Violence, in HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE* 53, 80 (1993).

27. ROTH, *supra* note 24, ¶ 195, at 120.

28. Richly documented for Germanic sources of the central Middle Ages in 1 RUDOLF HIS, *DAS STRAFRECHT DES DEUTSCHEN MITTELALTERS* 510 (1964) (1920).

29. RUTH MELLINKOFF, *THE MARK OF CAIN* 23 (1981); see A. Erler, *Brandmarken ins Antlitz*, in *RECHTSGESCHICHTE, RECHTSSPRACHE, RECHTSARCHÄOLOGIE, RECHTLICHE VOLKSKUNDE. FESTSCHRIFT KARL SIEGFRIED BADER* 115, 115-20 (F. Elsener & W.H. Ruoff eds., 1975).

30. See A.F.P. HULSEWÉ, *REMNANTS OF CH'IN LAW* 14-15 (1985), quoted more fully *infra* text accompanying note 152; see also 1 His, *supra* note 28, at 525; ROTH, *supra* note 24, ¶ 127, at 105.

31. JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 180 (1964).

32. S. Insler, *The Shattered Head Split and the Epic Tale of Śakuntala*, 7-8 *BULL. D'ÉTUDES INDIENNES* 97 (1989-90).

33. ROTH, *supra* note 24, ¶ 9, at 157, ¶ 194, at 120; see also A.S. DIAMOND, *PRIMITIVE LAW, PAST AND PRESENT* 100 (1971). For some literature on these sympathetic penalties, and the view that they have nothing to do with talion properly understood, see A. LÖFFLER, *DIE SCHULDFORMEN DES STRAFRECHTS IN VERGLEICHEND-HISTORISCHER UND DOGMATISCHER DARSTELLUNG* 29 (1895). For an example from modern anthropological evidence, see 2 C. DOKE, *Social Control among the Lambas*, in *BANTU STUDIES* 39 (1923). For the importance of sympathetic magic, see also H. OLDENBERG, *VORWISSENSCHAFTLICHE WISSENSCHAFT: DIE WELTANSCHAUUNG DER BRAHMANA-TEXTE* (1919).

34. For example, see 1 FONTES, *supra* note 23, at 59 (flogging), 52 n.1.b.B (somewhat mysterious "fustuarium supplicium," "the punishment by clubbing"). I cite these texts while recognizing that they call for fuller discussion, which would be out of place in this Article.



nese law dating to the third century B.C., revolves around a well-articulated system of mutilation punishments, some posthumous.<sup>35</sup>

Nor does the matter end there; for the archaic codes also show, at least at times, a concern with bodily mutilation that does not involve penalties at all. Here again we may refer to the Twelve Tables, which, according to the testimony of Cicero, provided that a grossly deformed child was to be killed.<sup>36</sup> Perhaps we might also include here various biblical and Near Eastern provisions that call for the disfiguring but otherwise mild mutilation of slaves through hair-cutting, ear-piercing and the like.<sup>37</sup> Yet more broadly, and perhaps very significantly, the theme of mutilation often has a connection with social status: Even non-enslaved persons of low social status (including perhaps the famously mysterious class of early Roman debtors?<sup>38</sup>) are at times subject to mutilation of various kinds.<sup>39</sup> The list of mutilation provisions is, moreover, easily extended if we include widespread religious regulations requiring that persons performing sacrifices be of un mutilated body;<sup>40</sup> or prescribing particular mutilations for religious purposes;<sup>41</sup> or requiring that sacrificial animals be un mutilated.<sup>42</sup> Bodily mutilation is, in short, a large theme, with very various reference in our sources.

35. See HULSEWÉ, *supra* note 30, at 14-15, quoted more fully *infra* text accompanying note 152.

36. 1 FONTES, *supra* note 23, at 35.

37. Exodus 21: 5-6 (boring of the ear of a slave); ROTH, *supra* note 24, ¶ 52, at 67 (slave hairlock). See generally Raymond Westbrook, *Slave and Master in Ancient Near Eastern Law*, 70 CHI-KENT L. REV. 1631, 1666-67 (1995). For ear-cutting in the Germanic sources, see 1 His, *supra* note 28, at 520. For cutting of the hair, see *supra* note 30 and accompanying text. For a large assemblage of Old Testament passages involving all parts of the body, see L. HOLDEN, FORMS OF DEFORMITY (1991).

38. This again raises points too complex to be discussed in this Article. I simply note that there is a case to be made that the famously mysterious injunction, "partis secanto," describes a mutilation practice of the kind whose widespread nature I here document. See 1 FONTES, *supra* note 23, at 33. Does Middle Assyrian Laws, for example, offer a parallel to this famous Roman provision? See ROTH, *supra* note 24, ¶ 44, at 170.

39. See 1 His, *supra* note 28, at 528; HERMANN NEHLSSEN, SKLAVENRECHT ZWISCHEN ANTIKE UND MITTELALTER: GERMANISCHES UND RÖMISCHES RECHT IN DEN GERMANISCHEN RECHTSAUFZEICHNUNGEN 319 (1972). This connection with social status was the occasion for the fascinating argument of Radbruch that the history of criminal law is the history of the extension of penalties once applied only to unfree persons throughout the entire society. See G. RADBRUCH, *Der Ursprung des Strafrechts aus dem Stande der Unfreien*, in ELEGANTIAE IURIS CRIMINALIS. VIERZEHN STUDIEN ZUR GESCHICHTE DES STRAFRECHTS (2d ed. 1950).

40. See, e.g., P. STENGEL, DIE GRIECHISCHEN KULTUSALTERTÜMER 38 (1920); G. WISSOWA, RELIGION UND KULTUS DER RÖMER 491 (2d ed. 1912).

41. MIRCEA ELIADE, LE SACRÉ ET LE PROFANE 160-62 (1965); see, e.g., A. VAN GENNEP, THE RITES OF PASSAGE, 71-74 (M. Vizedom & G. Caffee trans., 1961) (1908).

42. See, e.g., 1 MARTIN P. NILSSON, GESCHICHTE DER GRIECHISCHEN RELIGION 167 (1967); WISSOWA, *supra* note 40, at 416.

Also very widespread, and perhaps somehow conceptually linked with mutilation, is the death penalty. The connection between death and mutilation, however, is unclear. The death penalties of some early enactments resemble, in their general form and structure, mutilation penalties. Thus, we see talionic death penalties,<sup>43</sup> non-talionic death penalties,<sup>44</sup> and what may be sympathetic death penalties as well.<sup>45</sup> We also see, in a variety of records, posthumous mutilation.<sup>46</sup> It is not, however, easy to say whether death should be regarded as belonging to the very widespread category of mutilation or not.

### B. Price-Setting

Regulation of mutilation is only the first of our two widespread types of archaic regulation. For alongside mutilation, archaic enactments often establish monetary penalties. In particular, many archaic sources establish monetary penalties for the very cases of bodily mutilation that other sources treat talionically. The most famous of these are the composition tables of early medieval Germanic law, which often describe mutilations in baroque, and somewhat unreal,<sup>47</sup> detail. We may take, as one example out of many, the laws of Alfred:

44. 30 shillings shall be given as compensation for a wound on the head, if both bones are pierced.

§ 1. If the outer bone [only] is pierced, 15 shillings shall be given as compensation.

45. If a wound an inch long is inflicted under the hair, one shilling shall be given as compensation.

§ 1. If a wound an inch long is inflicted in front of the hair, 2 shillings [shall be paid] as compensation.

46. If either ear is struck off, 30 shillings shall be given as compensation.

§ 1. If the hearing is stopped, so that he cannot hear, 60 shillings shall be given as compensation.

43. On talionic death penalties in Germanic law, see Karl von Amira, *Die Germanischen Todesstrafen*, 31 ABHANDLUNGEN DER BAYERISCHEN AKADEMIE DER WISSENSCHAFTEN 1, 20 (1922).

44. E.g., 1 FONTES, *supra* note 23, at 56; Amira, *supra* note 43; ROTH, *supra* note 24, ¶ 26, at 63; see also *id.* ¶¶ 4-8, at 81-82.

45. ROTH, *supra* note 24, ¶ 25, at 85, ¶ 229, at 125.

46. See, e.g., C. Carmichael, "An Eye for an Eye, and a Tooth for a Tooth": The History of a Formula (1993) (unpublished manuscript, on file with author); HULSEWÉ, *supra* note 30, at 14.

47. These are unreal in two senses: First, they treat mutilations of so many kinds that it is hard to believe that every provision codifies an actual "precedent"; second, they call for money compensation, when in fact compensation was made in kind. See W. SCHILD, *Wergeld*, in *HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE* col. 1269 (A. Erler et al. eds., 1994); HATTENHAUER, *supra* note 13, at 19-20.

47. If anyone knocks out a man's eye, he shall give him 66 shillings, 6 pence and the third part of a penny as compensation.

§ 1. If it remains in the head, but he can see nothing with it, one third of the compensation shall be withheld.

48. If anyone strikes off another's nose, he shall pay him 60 shillings compensation.

49. If anyone knocks out another's front tooth, he shall pay 8 shillings compensation for it.

§ 1. If it is a back tooth [that is knocked out], 4 shillings shall be given as compensation.

§ 2. A man's canine tooth shall be valued at 15 shillings.

\* \* \*

56. If the thumb is struck off, 30 shillings must be paid as compensation for it.

§ 1. If the nail is struck off, 5 shillings must be paid as compensation for it.

57. If the first finger is struck off, the compensation [to be paid] shall be 15 shillings; for the nail of the same, 3 shillings [compensation shall be paid].

58. If the middle finger is struck off, the compensation [to be paid] shall be 12 shillings; for the nail of the same, 2 shillings compensation shall be paid.

59. If the third finger is struck off, 17 shillings must be paid as compensation for it; for the nail of the same, 4 shillings [must be paid as compensation].

60. If the little finger is struck off, 9 shillings must be paid as compensation for it; and one shilling [must be paid as compensation for] the nail of the same, if it is struck off.<sup>48</sup>

But the Germanic version of such money penalties is only the most elaborate version of something that is extremely widespread indeed. Thus the ancient Near Eastern codes show composition too, though not in the same measure of elaboration.<sup>49</sup> The same is true of the Twelve Tables,<sup>50</sup> of the ancient Cretan Laws of Gortyn,<sup>51</sup> and of many other sources.<sup>52</sup> In a number of these sources, composition stands alongside talionic mutilation. Thus, the Laws of Hammurabi link the

48. LAWS OF THE EARLIEST ENGLISH KING 87-88 (F. Attenborough ed., 1922).

49. ROTH, *supra* note 24, ¶ 26, at 65-68; *see also* RAYMOND WESTBROOK, *STUDIES IN BIBLICAL AND CUNEIFORM LAW* 36-88 (1988).

50. *See infra* note 54 and accompanying text.

51. *See the material translated in* R.F. WILLETTTS, *THE CIVILIZATION OF ANCIENT CRETE* 217 (1977).

52. *See, e.g., the variety of traditions surveyed in* JOSEPH WEISWEILER, *BUßE, BEDEUTUNGSGESCHICHTLICHE BEITRÄGE ZUR KULTUR-UND GEISTESGESCHICHTE* 148 (1930).

choice of talion or composition to social status (as well as adding the special (mutilation? shame?) punishment of flogging in one case of differential status):

§ 196. If an *awilu* should blind the eye of another *awilu*, they shall blind his eye.

§ 197. If he should break the bone of another *awilu*, they shall break his bone.

§ 198. If he should blind the eye of a commoner or break the bone of a commoner, he shall weigh and deliver 60 shekels of silver.

§ 199. If he should blind the eye of an *awilu*'s slave, or break the bone of an *awilu*'s slave, he shall weigh and deliver one-half of his value [in silver].

§ 200. If an *awilu* should knock out the tooth of another *awilu* of his own rank, they shall knock out his tooth.

§ 201. If he should knock out the tooth of a commoner, he shall weigh and deliver 20 shekels of silver.

§ 202. If an *awilu* should strike the cheek of an *awilu* who is of status higher than his own, he shall be flogged in the public assembly with 60 stripes of an ox whip.<sup>53</sup>

As for the Twelve Tables: They seem to make the choice of talion or composition depend on the severity of the injury in question:

8, 2. If a person has maimed another's limb [in such a way as to result in permanent disfigurement?], let there be retaliation in kind, unless he makes agreement for composition with him.

8, 3. If he has broken or bruised freeman's bone with hand or club [in such a way as not to result in permanent disfigurement?], he shall undergo penalty of 300 pieces; if a slave's, 150.<sup>54</sup>

In one form or another, composition thus looms at least as large in our sources as does talion.

Here again, though, we should note immediately that the setting of composition is only a *sub*-category of what we find. The larger category, quite clearly, is the more general category of price-setting. Many of the composition enactments are associated with other forms of price-setting both of commodities and of wages. Price-setting is thus a particularly prominent feature of the Laws of Hammurabi and the Laws of Eshnunna, both dating to the eighteenth century B.C. The text of the Laws of Eshnunna, indeed, begins with the setting of commodity prices and wages:

53. ROTH, *supra* note 24, at 121.

54. 1 FONTES, *supra* note 23, at 53. I offer the suggestion in brackets tentatively, aware of the considerable controversy about the meaning of these provisions. See, e.g., A. Watson, *Personal Injuries in the XII Tables*, 43 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 213 (1975).

§ 1. 600 silas of barley (can be purchased) for 1 shekel of silver. 3 silas of fine oil—for 1 shekel of silver.

\* \* \*

§ 3. A wagon together with its oxen and its driver—100 silas of grain is its hire. If (paid in) silver, 1/3 shekel (i.e. 60 barleycorns) is its hire. He shall drive it for the entire day.

§ 4. The hire of a boat is, per 600-sila capacity, 2 silas; furthermore, [x] silas is the hire of the boatman. He shall drive it for the entire day.<sup>55</sup>

In one set of striking provisions from the Laws of Hammurabi, the price-setting seems to reveal precisely the same mentality, focused on body and social standing, that we see in mutilation regulations:

§ 221. If a surgeon should set an *awilu*'s broken bone or heal an injured muscle, the patient shall give the physician 5 shekels of silver.

§ 222. If he (the patient) is a member of the commoner class, he shall give 3 shekels of silver.

§ 223. If he (the patient) is an *awilu*'s slave, the slave's master shall give the physician 2 shekels of silver.<sup>56</sup>

Such setting of commodity prices and wages seems to characterize the entire cultural circle of the ancient near east, featuring in the Hittite Laws as well.<sup>57</sup>

Price-setting of the ancient near-eastern sort is less prominent in many of our sources from more westward-lying parts. But there is also considerable price-setting to be found in the west.<sup>58</sup> Thus, among early Germanic laws, we may cite the laws of Ine of Wessex;<sup>59</sup> or the Burgundian Code, which again reveals a kind of keying of price to status:

#### XCV OF TRACKERS (*Vegii, Veiatores*)

If anyone has lost a bondservant, a horse, ox, cow, mare, sheep, pig, bees, or goat, and if there is a way-pointer (tracker, *vegius*) present (who helps him), let him pay the way-pointer five solidi for the bondservant; for the horse, three solidi; for the mare, two solidi; for the ox, two solidi; for the cow, one solidus; for the sheep, one solidus; for the pig, one solidus; for the bees, one solidus; for the goat, a remissis.<sup>60</sup>

55. ROTH, *supra* note 24, at 59.

56. *Id.* at 124.

57. *Id.* ¶¶ 148-62b, at 232-33 (Hittite Laws).

58. DIAMOND, *supra* note 33, at 73, 316.

59. LAWS OF THE EARLIEST ENGLISH KING, *supra* note 48, at 57.

60. THE BURGUNDIAN CODE 83 (K.F. Drew trans., 1972) (1949).

The Burgundian Code also shows one of the most prominent forms of early Germanic price-setting: setting of brideprice.<sup>61</sup> We may also cite the law of the Ripuarian Franks, which displays price-setting as part of the system of composition: The setting here seems to have been done in order to facilitate the assessment of composition payments.<sup>62</sup>

Finally, the Twelve Tables are associated with price-setting too—though in a way rarely discussed by scholars of Roman law. Our sources show the tradition that the Twelve Tables (451/450 B.C.) were promulgated at the same time as, and somehow in connection with, two price-setting statutes: the *lex Aternia Tarpeia* of 454 B.C. and the *lex Menenia Sestia* of 452 B.C. Both of these statutes were concerned, in somewhat mysterious ways, with setting the correct bronze equivalents for animals. Both also had some, again somewhat mysterious, connection with controlling the assessment of fines by magistrates.<sup>63</sup>

## II

What are we to make of all this? It seems clear enough that social contract theory has little hope to offer; there is no easy way to make Lockean sense out of these strange sources. But what sort of sense should we make out of them?

In their effort to make sense of these sources, scholars have, from the beginning of our modern interpretive tradition, worked fundamentally along the same lines, making one key assumption and following one key pattern in their use of the sources. To begin with the first of these, scholars have always made the paradigmatically sophisticated assumption of professional legal historians: They have assumed that the archaic codes do not represent any kind of innovative legislative activity on the part of the state. Instead, they have worked from the assumption that these archaic sources simply codified existing custom—or indeed did no more than notate “precedents” drawn from the resolution of private disputes.<sup>64</sup> (It is because they make this assumption—that early states were simply reacting to private disputes—

61. *Id.* at 85-86; cf. D. HERLIHY, *MEDIEVAL HOUSEHOLDS* 50 (1985).

62. *LAWS OF THE SALIAN AND RIPUARIAN FRANKS* 185-86 (Theodore J. Rivers trans., 1986).

63. EMILIO PERUZZI, *MONEY IN EARLY ROME* (1985); Arrigo D. Manfredini, *Tre Leggi Nel Quadro Della Crisi Del V Secolo*, 22 *LABEO* 198-231 (1976). Also of obvious significance on this point, but raising some difficult issues, is the setting of interest rates. See 1 FONTES, *supra* note 23, at 62; ROTH, *supra* note 24, at 97-99.

64. See the discussion of 1 RUDOLF VON JHERING, *DER ZWECK IM RECHT* 137 (1884); see also *infra* notes 105-06 and accompanying text; ROTH, *supra* note 24, at 4.

that many legal historians have been uneasy about the use of the term "codes," which seems to assume all too proactive a state.)

Alongside this key assumption of, as it were, "state reactivity," our interpretive tradition has also been characterized by a key pattern in its use of the sources. From the beginning of our interpretive tradition, scholars considering the archaic sources have overwhelmingly focused on the two *sub-categories* of mutilation and price-setting that I have described: talion and composition. For more than two centuries, legal historians have been preoccupied with working out the relation between talionic mutilation and composition payments; as a result, they have not delved more broadly into the meaning of mutilation or meaning of price-setting.

This pattern of focusing on the two sub-categories of talion and composition established itself, I now want to show, for one reason first and foremost: because, for the German scholars who first developed the self-help model, the capital problem was the interpretation of biblical talion. In its treatment of the sources, our scholarly tradition began as an attempt to interpret "eye for an eye, tooth for a tooth"; and in many ways it has never gotten beyond that starting point.

We can already see the strength both of the assumption of state "reactivity," and of the focus on talion, in what was perhaps the first scholarly version of the self-help hypothesis: the version mounted by J.D. Michaelis of Göttingen, whose *Mosaic Law* began appearing in 1770. We can also see something else in Michaelis: how much the self-help tradition was the child, albeit the rebellious child, of the social contract tradition.

Michaelis, now largely forgotten, was a famous man in the eighteenth century, known as the scholar whose learning showed the Bible to be so alien that it lost its authority as a source of law in German courts.<sup>65</sup> He worked in a way typical of the new and lively scholarly tradition of Göttingen, then the greatest center of university scholarship in the European world, and an institution where serious historical and comparative work was pursued as nowhere else.<sup>66</sup> Göttingen was a place where careful comparative and historical scholarship was slowly beginning to eclipse the abstract philosophical style that had

65. For Michaelis's biography and importance, though without attention to the issue I discuss here, see F. SCHAFFSTEIN, JOHANN DAVID MICHAELIS ALS KRIMINALPOLITIKER. EIN ORIENTALIST AM RANDE DER STRAFRECHTSWISSENSCHAFT. NACHRICHTEN DER AKADEMIE DER WISSENSCHAFTEN IN GÖTTINGEN, I. PHILOGISCH-HISTORISCHE KLASSE, JAHRGANG 100-02 (1988).

66. Cf. PETER H. REILL, THE GERMAN ENLIGHTENMENT AND THE RISE OF HISTORICISM 193 (1975) (discussing Michaelis).

characterized the Enlightenment, and Michaelis fit the larger pattern of the university. He was a lover and interpreter of difficult evidence, who attempted to reconstruct the historical nature of Hebrew society comparatively, setting an important and lasting pattern by taking much evidence from Arab practices. And his love of evidence made him a cautious skeptic of the Enlightenment—for it led him to argue, as no social contract theorist had ever so argued, that biblical talion must have been produced by a reactive state and not by an innovative legislator.

What, Michaelis asked, was biblical talion? His answer started from the proposition that there had been a system of vengeance in early Jewish law parallel to the system of vengeance among the Bedouin, a system founded in the idea of avenging insults to one's personal honor.<sup>67</sup> It was this that explained "eye for an eye, tooth for a tooth": that rule came, not from God, but from the Israelite social order. There had been a system of ancient Israelite vengeance, involving reciprocal body mutilation: In a vengeance-obsessed state of nature people had regularly been gouging one another's eyes out. Faced with this existing practice, the reactive early Israelite state had not acted as a Lockean state might have acted, setting out to eliminate vengeance violence. Rather, it had obliquely sanctioned and institutionalized the existing order of vengeance violence.

Thus, setting himself apart from his enlightened contemporaries,<sup>68</sup> Michaelis coolly declared that the human impulse to do mutilatory vengeance was perfectly natural; and he rejected "moral" objections to the idea that the early state might cheerfully have taken over the functions of a primitive system for the exaction of violent vengeance:

That in the state of nature every man has a right to take revenge at his own hand for any deliberate personal injury, such as the loss of an eye, &c. is perhaps undeniable. In fact, by the law of nature such revenge might be carried still farther: but if it be confined within the limits of strict retaliation, the law of nature, at any rate (for of morality I do not now speak) can certainly have nothing to object against it. Now, in the state of civil society, every man divests himself of the right in question; but then he justly expects in return, that society will, after proper inquiry, duly exercise revenge in his room. Morality may say what it will to our revenge, (and certainly it

67. 2 JOHANN D. MICHAELIS, COMMENTARIES ON THE LAWS OF MOSES 192, 214-15 (1814) ("Of the Laws respecting the *Goël* or Blood-avenger").

68. C. NIEBUHR, BESCHREIBUNG DER ARABIEN 33 (1772); see also O. PRO[c]KOSCH, BER DIE BLUTRACHE BEI DEN VORISLAMISCHEN ARABERN UND MOHAMMEDS STELLUNG ZU IHR 1 & n.1 (1899).



does not absolutely condemn it,) but we are all naturally vindictive, and *that* to such a degree, that when we are grossly injured we feel a most irksome sort of disquietude and feverish heat, until we have gratified our revenge. Now, when creatures, thus constituted, are the citizens of any government, can we imagine, that they will ever give up the prerogative of revenge, without looking for some equivalent in return? If the state means to withhold that equivalent, and yet prohibit the exercise of revenge, it must begin by regenerating human nature: or, if it be said, that God and his grace can alone effect such a change, and that whoever lays open his heart to grace, will never desire revenge, I can only say, that we must then figure to ourselves a state consisting of none but people all truly regenerated; but such a state the world has never yet seen.<sup>69</sup>

Biblical talion arose when pre-state vengeance became vengeance executed by the state: "Moses retained the law of retaliation, from a more ancient, and a very natural, law of usage."<sup>70</sup> "Eye for an eye, tooth for a tooth" was not the product of the wisdom of any divinely guided legislator. It was the product of a spontaneous order in the state of nature, ratified perforce by an early lawgiver who was simply yielding to the unconquerable impulses of the population around him.

Talion was, moreover, only part of Michaelis's story. He also had views on composition; for he believed that individuals liable to talionic vengeance would have had the option of buying their way out of the penalty, of ransoming their limbs. The possibility of ransoming one's limbs meant that a tacit system of composition must have existed alongside the talionic system described in the biblical sources. Even if the biblical sources did not fully describe any system of composition, victims must have had the option of demanding payment in place of mutilatory vengeance:

The person who suffered any personal injury, retained (for he is no where deprived of it,) the natural right of abstaining, if he chose, from all complaint, and even of retracting a complaint already made, and remitting the punishment, if the other compounded with him for what we should call a *pecuniary indemnity* or, to use the Hebrew expression, a *ransom*—Not to mention that this right is quite natural and obvious, and scarcely requires to be noticed in a penal statute, it may be observed, that among the Israelites such pecuniary expiations had been previously common, even in the case of deliberate murder, as they still are among the Orientals, and that in this case alone did Moses find it necessary to prohibit the acceptance of any such compensation; Numb. xxxv. 31. If it was customary in cases of deliberate murder, we may conclude with certainty, that it would frequently be accepted for the loss of a tooth or an

69. 3 MICHAELIS, *supra* note 67, at 460.

70. *Id.* at 449.

eye; and as Moses does not prohibit this, we must suppose that the ancient usage still continued to prevail.<sup>71</sup>

Michaelis's postulate of a tacit ransom option was quite significant: It meant that, according to Michaelis's analysis, there was no developmental sequence from talion to composition. The very existence of talion assumed the simultaneous possibility of composition: It was always possible to ransom one's limbs. This was an elegant argument, which Michaelis surrounded with numerous elegant observations; and it was (as we shall see) very probably a correct argument<sup>72</sup>—though of course it did not go so far as to deal with the full range of price and mutilation to be found in the archaic sources unknown to Michaelis.

At any rate, Michaelis had already, in the 1770s, laid out the general outlines of what would become the dominant strain in the scholarship of legal history. But, he was far ahead of his time. Most German authors around the turn of the eighteenth and nineteenth centuries, as far as I can judge, continued to subscribe to some form of social contract theory, and most commonly some Kantian form.<sup>73</sup> (Scottish thinkers present a notable contrast.<sup>74</sup>) Michaelis's ideas too blithely relativized the rights and wrongs of violence and vengeance to be easily accepted by German legal thinkers. It was only with the composition of Hegel's *Philosophy of Right*, in the years 1817 and after, that the question of talionic vengeance, largely though not wholly addressed in the fashion of Michaelis, began to play its role as the basis of a really new and dominant alternative to social contract theory.<sup>75</sup> But once it established itself, it became dominant indeed.

71. *Id.* at 451.

72. See *infra* text accompanying notes 121-23.

73. We may take, as an example, the most important German author of the period on the philosophy of criminal law, P.J.A. Feuerbach, who accepted a Kantianized version of social contract theory. See, e.g., P.J.A. FEUERBACH, *ANTI-HOBBS* (1967) (1997).

74. See J. Miller, *The Origin of the Distinction of Ranks*, in W. LEHMANN, JOHN MILLER OF GLASGOW, 1735-1801, at 255 (1979). Miller describes "the gradual progress in the judicial power of a magistrate, from the period when he is merely an arbiter, to that when he is enabled to execute his decrees . . . ." This Article focuses on the German tradition, not because I wish to deny the power of tradition, in Scotland and elsewhere, but because my concern is to trace the roots of a literature in legal history that carries the peculiar impress of German thought.

75. For the developing lecture versions, see G.W.F. HEGEL, *DIE PHILOSOPHIE DES RECHTS. DIE MITSCHRIFTEN WANNENMANN* (1817/18) UND HOMEYER (1818/19) (Karl H. Ilting ed., 1983); G.W.F. HEGEL, *PHILOSOPHIE DES RECHTS. DIE VORLESUNG VON 1819/20 IN EINER NACHSCHRIFT* (D. Henrich ed., 1983); G.W.F. HEGEL, *VORLESUNGEN ÜBER NATURRECHT UND STAATSWISSENSCHAFT* (1983); G.W.F. HEGEL, *VORLESUNGEN ÜBER RECHTSPHILOSOPHIE 1818-1831* (Karl H. Ilting ed., 1973-74). How much of Hegel's account was derived from Michaelis? I do not know—though Hegel clearly knew Michaelis, and Michaelis was, at that date, a standard commentator on biblical law. See P.J. VERDAM, *MOAIC LAW IN PRACTICE AND STUDY THROUGHOUT THE AGES* 40 (1959). Most importantly, Michaelis was cited for the importance of his views on this point by Wilda. See *infra* text accompanying notes 86-94; 1 WILHELM E. WILDA, *GESCHICHTE DES DEUTSCHEN STRAFRECHTS. DAS STRAFRECHT DER GERMANEN* 170 n.1

From Hegel onward, German scholars would tend to subsume all their interpretations within the talion/composition paradigm, even as the scholarly digging of the nineteenth century produced more and more sources that displayed all sorts of strange provisions not to be found in Exodus.

This focus on biblical law would prove conceptually damaging, as we shall see. But once Hegel became a leading figure in our thinking about legal history, it was probably inevitable that biblical law would take center stage. Hegel's concern was never with the full range of archaic sources. Hegel was a sort of Christian theologian,<sup>76</sup> deeply concerned with the evolution of *Geist* from Old Testament to New Testament and beyond, with the unfolding of God's will as expressed through the sublation of the old covenant in the new covenant.<sup>77</sup> Hegel's approach to legal history inevitably tended to begin with the problem of how the new covenant had replaced the old. This made it all too natural for Hegel to imagine the problem of archaic legal history as beginning with the problem of talion; and it meant that legal history written under Hegel's influence would inevitably be, consciously or not, lingeringly Christian legal history—a legal history fascinated with the problem of how legal development transcended talion.

Let us then follow Hegel's imagination, as he approached once again the question of talion, a half-century after Michaelis wrote. Michaelis had mounted his argument in, fundamentally, a common-sense way; and he had started from the enlightened assumption that the archaic human mentality was easily comprehensible to us. That assumption was not Hegel's style. Hegel wanted to push deeper than Michaelis into the character of archaic legal thinking; and his focus was accordingly (as his critics still complain) not on the aims of the state, but on the structures of "subjective" legal consciousness.<sup>78</sup> The state, for Hegel, was something that should be logically treated as the *end point* of a legal history that began in forms of consciousness

(1842). Also perhaps of some importance was another account that should be mentioned: that of 1 HEINRICH E. DIRKSEN, *CIVILISTISCHE ABHANDLUNGEN* 104-05 (1820). Dirksen is credited with the creation of the self-help theory by P.-F. GIRARD, *LES ACTIONS NOXALES* 47-48 (1888). I am uncertain exactly what Dirksen's importance, and his relationship to Hegel, may have been.

76. Emphasizing Hegel's Christianity is, of course, not to deny his well-known debt to comparatively secular thinkers, especially Scottish ones. See *supra* note 74.

77. See generally on Hegel's Christian background L. DICKEY, *HEGEL: RELIGION, ECONOMICS, AND THE POLITICS OF SPIRIT, 1770-1807* (1987); the discussion of H.S. HARRIS, *HEGEL'S DEVELOPMENT: TOWARD THE SUNLIGHT, 1770-1801*, at 335 (1972). I am particularly indebted to conversations with Michael Hoffheimer on this topic.

78. See OSSIP K. FLECHTHEIM, *HEGELS STRAFRECHTSTHEORIE* 70 (2d ed. 1975).

deeply alien to modern persons. Hegel's account of the significance of biblical talion had, accordingly, a different cast from Michaelis's.

To Hegel, who now pushed the bark of scholarship decisively far from the shores of social contract theory,<sup>79</sup> talion inevitably reflected a basic dynamic in the evolution of all subjective legal consciousness in the course of the unfolding of God's plan. Old Testament Hegelian man could not have been the rational actor of social contract theory; for he had not yet run the great path of the evolution of legal consciousness. And what was that path? In the development of subjective legal consciousness, Hegel saw a movement from the specific to the universal—or, to put it in our more crass terms, from the non-fungible to the fungible. The evolution of legal consciousness was, at least in large measure, about the development of the idea of value-equivalence, of the idea that it is possible to put a price on things.<sup>80</sup> For Hegel and the Hegelian tradition, this had two significant implications for the talion/composition problem as Michaelis had framed it. The first significant implication (for Hegel's followers, though not clearly for Hegel himself) was that talionic mutilation had to *precede* composition in the history of legal development; for composition clearly revealed a more advanced value-consciousness than could be found in talion. The second significant implication was that there would be, in the Hegelian tradition, little to say about the aims of the primitive state—even less than there was to say about the primitive state in Michaelis's account. For the fundamental Hegelian drama of the early stages of legal development was the drama, not of state action, but of the evolution of a gradually more-and-more self-aware subjective legal consciousness.

These were points that began to emerge in the dense matter of two paragraphs of Hegel's *Philosophy of Right*, Sections 101 and 102,

79. For Hegel as a critic of social contract theory, and as one in particular whose "portrait of human life [was] closer to history and reality than the abstractions of the contractarian school," see J.W. GOUGH, *THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS DEVELOPMENT* 185-86 (1957), *quoted and discussed in* Bruce Haddock, *Hegel's Critique of the Theory of Social Contract*, in *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* 147 (D. Boucher & P. Kelly eds., 1994). For Hegel's critique of social contract theory as founded in the inapplicability of private contract law to the public order, see J.-F. Kervégan, *Hegel und die Vergesellschaftung des Staates*, 12 *RECHTSHISTORISCHES JOURNAL* 453 (1993). Nevertheless, we tend to forget what Hegel's immediate disciples knew: how central talion was to Hegel's argument. See K.L. MICHELET, *DAS SYSTEM DER PHILOSOPHISCHEN MORAL* 47 (1968) (1828); *infra* note 83 and accompanying text.

80. Cf. FLECHTHEIM, *supra* note 78, at 103-04; P. Landau, *Das Unrecht als Stufe des abstrakten Rechts in Hegels Rechtsphilosophie. Zugleich zum Verhältnis Hegels zu Kants "Metaphysischen Anfangsgründen der Rechtslehre"*, in *JENSEITS DES FUNKTIONALISMUS* 160-62 (L. Philipps & H. Stoller eds., 1989).

in which Hegel set the pattern for the discussion of the development of criminal law using evolutionary terms typical of his philosophy. As Hegel expressed it in these paragraphs, the idea of "eye for an eye, tooth for a tooth" was a primitive stage in the development of the idea of retaliation, one that revealed a primitive legal mind still thinking in terms of specific, thing-to-thing equivalences. But, as in other areas of law, this primitive idea carried within it the kernel of a more sophisticated law founded in value-equivalence,<sup>81</sup> and the history of criminal law showed the slow emergence of value-equivalence into the light. Talionic vengeance, with its primitive idea of exact equivalence, belonged to a necessary early stage in a slow evolution toward civilized criminal law, with its more sophisticated idea of value-assessed retribution.<sup>82</sup>

Here lay the outline of a dramatic new philosophical picture of the evolution of law: As Hegel's disciple and systematic expounder Karl Ludwig Michelet excitedly put it a few years later, Hegel's evolu-

81. G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS § 101, at 192-94 (1970). The main paragraph set out Hegel's concept of retribution in general terms:

The sublation [*Aufheben*] of an offence is *retaliation* [*Wiedervergeltung*] to the extent that it is, according to its concept, an injury, and to the extent that the offense has, according to the existing form it takes, a determinate qualitative and quantitative extent, which means that its negation also, in the existing form it takes, has such a determinate qualitative and quantitative extent. This identity, resting on the concept, is however equality, not in the specific character of the injury, but in the existing character of the injury *an sich*—according to its *value*.

Hegel's sub-paragraph introduced talion into his scheme for the first time:

[I]t is very easy to present retaliatory punishment (as theft for theft, eye for eye, tooth for tooth, where one is fully able to imagine the perpetrator as one-eyed or toothless) as an absurdity. The fault here lies, however, not with the concept, but merely with the *specific equivalence* to which it gives rise. *Value*, as the *inner equality* of things that are, according to their existence, thoroughly different, is a determination that has already appeared in contracts (see above) and in civil suits against crimes (§ 95), a determination by means of which representation of things is translated from their *immediate* characteristic into their more general.

*Id.*

82. In [the] sphere of the immediacy of right, the cancellation [*Aufheben*] of crime is at first [*zunächst*—somewhat misleadingly translated by Knox as primarily] *revenge*, and its *content* is just so far as it constitutes retribution. But in its *form*, it is the action of a *subjective* will which can place its *infinity* in any infringement [of right] which occurs, and whose justice is therefore altogether contingent, just as it exists *for the other party* only as a *particular* will. Thus revenge, as the positive action of a *particular* will, becomes a *new infringement*; because of this contradiction, it becomes part of an infinite progression and is inherited indefinitely from generation to generation.

Where the crimes are prosecuted and punished not as *crimina publica* but as *crimina privata* (as with theft and robbery among the Jews and Romans, and even today with certain offences in England, etc.) the punishment still has at least an element of revenge about it. Private revenge is distinct from the revenge of heroes, knightly adventurers, etc., which belongs to the period when states first arose.

HEGEL, *supra* note 81, § 102, at 196-97. I have here altered Knox's translation in G.W.F. HEGEL, PHILOSOPHY OF RIGHT 96 (T.M. Knox trans., 1971) (1952).

tionary doctrine of retaliation was "uniquely capable of serving as the philosophical foundation of criminal law."<sup>83</sup> By 1830, Hegel's historical argument had made its way strikingly into the writings of a leading criminal-law philosopher, the committed Hegelian<sup>84</sup> J.F.H. Abegg, probably the first to give the "self-help" model its name. Abegg analyzed various existing rights to self-help violence as survivals of an early vengeance stage in the development of the law:

Originally, matters are governed by *private vengeance* and *self-help*, and what has recently been characterized as so-called *natural* criminal law, outside of the state. By a necessary step in the progress of morals in the state, punishment-justice gradually replaces vengeance-justice, and brings it to pass that what was previously the *rule*, self-help, etc., comes gradually to be regarded as impermissible and vanishes, appearing only as an *exception*.<sup>85</sup>

Abegg then went on to draw the conclusion that was implicit in Hegel.<sup>86</sup> Composition must have followed talion in the course of the evolution of law:

Punishment, in the *form of vengeance* [in early Roman law], is here *talion*, proceeding from the subject, and it is also in the most external way *talion* according to its *content*, retaliation by the rule of *like for like* . . . . Through *contract*, the buying off of vengeance through payments, money atonements, wergeld (compositions), a limit is set, and thereby the way is paved for the transition to punishment-justice; and the original form of law becomes less common and indirectly sublated [aufgehoben], until the opposing principle expresses itself more definitely, and the earlier principle retains only exceptional applications . . . .<sup>87</sup>

Michaelis's ransom option existed—but it could only have developed *after* legal consciousness had begun to progress beyond talion—in the direction of the "Aufhebung" of vengeance.

It remained for this blossoming Hegelian interpretive tradition to make its way into the work of professional legal historians. That happened by 1842, with one of the most important and comprehensive early nineteenth-century studies: Wilhelm Eduard Wilda's unfinished masterpiece, *The History of Germanic Criminal Law*, still much cited

83. KARL L. MICHELET, *DAS SYSTEM DER PHILOSOPHISCHEN MORAL* 47 (1968) (1828).

84. See Teichmann, *J.F.H. Abegg*, in 1 *ALLGEMEINE DEUTSCHE BIOGRAPHIE* 6 (1967) (1875) (Abegg's desire to remain "immer . . . als Schüler Hegel's den leitenden Prinzipien desselben treu").

85. J.F.H. ABEGG, *UNTERSUCHUNGEN AUS DEM GEBIETE DER STRAFRECHTSWISSENSCHAFT* 123 (1830).

86. Apart from these verbal echoes, we can follow Hegel's influence on Abegg in his citations. See, e.g., *id.* at 114 n.486 (citing G.W.F. HEGEL, *PHILOSOPHIE DES RECHTS* 140 (1st ed., 1821)).

87. ABEGG, *supra* note 85, at 127-28.

as a standard work.<sup>88</sup> With Wilda, the place of the Hegelian-style self-help hypothesis came to be securely established in what remains our grand interpretive tradition to this day.

For it was Wilda who did the most to solidify and elaborate the Hegelian tradition, presenting the great problem of early legal history not so much as the problem of the goals of the "lawgiver," but as the problem of primitive legal *psychology*, of the basic sense of rights among primitive actors. Like Michaelis, Wilda analyzed primitive legal psychology as the psychology of vengeance, as the "irksome sort of disquietude and feverish heat" that followed an insult to one's honor. The lineaments of this psychology Wilda traced through work on a favorite Romantic-era source, literary narratives, in particular Norse saga literature and the like.<sup>89</sup> Vengeance was an early form of law that represented an assertion of a saga-style sense of personal pride and honor, and it was to be analyzed, in terms drawn from Hegelian legal philosophy, as having to do with the assertion of "personality".<sup>90</sup>

It is in vengeance that the legal consciousness first reveals itself; and vengeance is accordingly noble, at its root, for in vengeance Man announces himself as the kind of Man who, in what others do to him, feels, not bodily pain, nor the loss of some object, but disrespect for his personality . . . .<sup>91</sup>

To Wilda, this protection of the "respect for one's personality" was, however, merely an early Hegelian moment in the evolution of law, for it left much undeveloped. In particular, it did not recognize any need to establish an appropriate measure of retaliation. Here, Wilda cited Abegg:<sup>92</sup>

Vengeance is, however, only the rawest form of the rule of law, since it consists only in a generalized reaction against a wrong, while leaving everything else to chance: Whether vengeance is actually exacted; whether it is exacted in a measure appropriate to the measure of the wrong, so that the vengeance does not itself become a further wrong; whether it is exacted for a real injury or simply an imagined one? Vengeance is the representation of law from the purely subjective point of view.<sup>93</sup>

The "purely subjective" view was, of course, the first stage in the Hegelian evolution of legal consciousness; and in the Hegelian scheme,

88. 1 WILDA, *supra* note 75.

89. *E.g.*, *id.* at 172.

90. For "personality," cf. HEGEL, *supra* note 81, § 35, at 93-94.

91. 1 WILDA, *supra* note 75, at 157.

92. *Id.* at 157 n.1.

93. *Id.* at 157.

talion should have arisen next. As it happens, Wilda found strikingly little by way of talion to cite in his sources; nevertheless, he held that talion had indeed arrived in the Germanic world with the penetration of Christianity, characterized by its milder and more "progressive" consciousness, into the Germanic north.<sup>94</sup>

This left a final step to be explained: How did the composition tables of the most familiar of early Germanic sources, the barbarian codes, arise? The answer was that they arose through an (again) distinctly Hegelian development of value consciousness. Like Hegel, Wilda saw the problem of substituting a money-equivalent for a specific mutilation as much more difficult than Michaelis did. There was a mysterious development of "legal consciousness" here, one that introduced market forms into the world of saga honor:

Compensatory "amends" [Büssen (*bôtjan*)], a word that appears in all Germanic legal systems, means "to correct" (*emendare*). Amends are "correction," the making good of a wrong that has been done through payment of money or money's worth, whether as a consequence of composition or through some declaration by a court [*eines Urtheilsspruches*]. Amends presuppose guilt; guilt means owing amends. Through such a payment, the injured party receives something else for the good that he has lost—whether that good be the health of his body, his honor, or whatever. He receives something by means of which the loss was in some measure made good and an equality is reestablished between the two. In this regard, amends are a kind of legal damages—although amends are distinct from legal damages in the sense that they are given for goods that had no commercial or market price, even if there had been a legal valuation or assessment of them . . . .<sup>95</sup>

But how could this sort of commodification fit into a Germanic system founded in personal honor? Wilda's answer was that payment could also belong, in a non-commercial way, to an economy of honor and shame:

The payment of amends contained, however, at the same time, an *admission* that the wrong had been committed, and to that degree a *humiliation* on the part of the payor, and accordingly to some degree a reestablishment of honor for the injured party . . . . Since a stubborn pride was a principal feature of the Germanic character, one can understand how, viewed from this point of view, the payment of amends contained something satisfying, a *satisfactio* . . . by this means the idea was scotched that every insult could be gotten rid of through money like cheap merchandise, that it could be in some measure bargained away. Through payment of amends, the feelings of German were satisfied; what drove him to revenge and

94. *Id.* at 158.

95. *Id.* at 314.



enmity, to pursuit of his injurer by his own strength and his commitment to a punctilious protection of his rights, was assuaged and eliminated; he was reconciled, and to that degree amends were atonement money, were a *compositio*; but they were not so in the sense that a threatened or actually ignited feud, to which the injured was entitled by right, was thereby bought off.<sup>96</sup>

This was a remarkably interesting argument, one that may deserve some renewed attention.<sup>97</sup> But it must be emphasized that (even apart from its neglect of the larger themes of the sources that is my refrain here) Wilda's famous account, still so much cited, shared a critical weakness with Hegel's: Wilda focused so heavily on the inner development of legal consciousness that he left himself no room to discuss the activity of the early state. The state appeared, in Wilda's account, only in passing and only in the brusquest way, in the phrase "*oder eines Urtheilsspruches*."

Nevertheless, the Hegelianizing tendency of Wilda's account set the tone that would sound through all of the fundamental work on archaic legal history done in the next decade. Wilda's basic line of argument was extended to non-Germanic legal systems by legal historians of the early 1850s—in particular by J.L. Saalschütz and the great Rudolf von Jhering.<sup>98</sup> In 1853, Saalschütz took the important step of applying an expressly Hegelian model to the texts of biblical talion in his *Mosaic Law*, holding, Michaelis to the contrary notwithstanding, that composition must evolutionarily follow talion.<sup>99</sup> And in 1852, Jhering produced what would be the epochal account of the self-help model. It was Jhering who explicitly extended the model to cover all archaic systems; it was Jhering who carefully worked out the underlying Hegelian presuppositions of the argument;<sup>100</sup> most impor-

96. *Id.* at 315.

97. For a recent attempt to mount a very similar argument, see Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 56-86 (1993).

98. For an assessment of the influence of Hegel on Jhering, though not touching the point I discuss here, see WOLFGANG PLEISTER, *PERSÖNLICHKEIT, WILLE UND FREIHEIT IM WERKE JHERINGS* 148 (1982).

99. Whoever intentionally acts in such a way as to do harm to another, *originally*, according to the general *basis* of law [(Saalschütz's footnote): cf. HEGEL, *supra* note 86, at § 101], merited that an equivalent be done to him, thus "eye for an eye, tooth for a tooth," etc. This must be assumed when it comes to explaining the transformation of the merited bodily punishment into a money compensation.

2 JOSEPH L. SAALSCHÜTZ, *DAS MOSAISCHE RECHT NEBST DEN VERVOLLSTÄNDIGENDEN THALMUDISCH RABBINISCHEN BESTIMMUNGEN* 451-53 (1853).

100. I believe this is a correct characterization even though Jhering himself accused Hegel of neglecting developments that preceded the rise of the state. See 1 JHERING, *supra* note 64, at 237. In part, this accusation may reflect the fact that Jhering was more influenced by the Hegelian tradition than by Hegel himself; in part, it reflects the failure of the Hegelian tradition to grapple fully with the nature of the state that I trace throughout this Article.

tantly, perhaps, it was Jhering who treated the self-help model as an account of the rise of criminal law, but as the basic account of all general development at the origins of law and the state.

Like Wilda, Jhering began with primitive psychology, with the subjective sense of honor: "The first, inexorable, stirrings of the injured legal sense [Rechtsgefühls]," he wrote, "consist in the violent reaction against a wrong that has been done to one, consist in self-help and vengeance." These phenomena did not assume the existence of a state; on the contrary, they were very much law without legislator, law without state.<sup>101</sup> This pre-state state had left traces in the records of many societies, and could be reconstructed.<sup>102</sup> Reviewing a variety of provisions in the Twelve Tables, Jhering concluded that a system of vengeance, like the vengeance of the Norse sagas, lay at their heart. This was not just a matter of what we would now regard as criminal or even tortious:

The spirit [Geist] of archaic law is the spirit of vengeance, of getting satisfaction for every wrong that befalls one. Not only for intentional wrongs or wrongs where guilt lies, but also for unintentional wrongs and wrongs in which there is no question of guilt. Raw legal sense perceives a personal injury, a delict, in every contestation or denial of rights, and demands correspondingly not merely a simple acknowledgment or reestablishment of rights, but, beyond that, personal satisfaction, punishment of the opponent.<sup>103</sup>

Thus, punishment was inextricable from the getting of personal satisfaction for insult in every sphere of life, "civil" in our terms, as well as "criminal." "That punishment in all these cases serves simultaneously the function of damages is incontestable."<sup>104</sup>

This was, however, only the beginning of legal evolution in Jhering's famous account. For eventually, although somewhat mysteriously, the state began to appear. In particular, a judge, acting at first in quasi-private capacity, would set a customary composition, essentially drawing on precedent:

As a rule, it was possible for the exercise of private vengeance to be bought off, in the interest of both sides, and there could be no lack of precedents which the parties could use as a starting point for determining the composition sum in a particular matter. In the cases of many delicts, we find agreement about this sum still left entirely to the parties, but later the state takes the matter in hand, and,

101. RUDOLF VON JHERING, *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* 118-20 (9th. ed. n.d.).

102. *Id.* at 120.

103. *Id.* at 126.

104. *Id.* at 126-27.

when for example talionic mutilation could have occurred because one party demanded too much and the other offered too little, the judge instead set a composition figure. This is the system of Roman private punishment.<sup>105</sup>

From the fundamentally private judicial setting of penalties, the transition to a statutory scheme came easily, and with it, the transition to a purely composition-based system. Here we have Jhering's fine portrait of the development of a reactive state, gradually translating uncodified into codified custom:

The judge took his starting point for this determination of a composition sum, as observed above, from custom, and it was an obvious step in the direction of perfecting this procedure to establish once and for all a tariff of definite composition sums, such as we see in so many legal traditions. In the case of some delicts, we find such definite sums already prescribed in the Twelve Tables . . . .<sup>106</sup>

Here we have worked out in an elegant way, and in Jhering's characteristically crisp style, a well-argued and cogent version of the self-help model that could influence legal historians in every specialty.

From Jhering on, the self-help model would dominate, even as the later nineteenth century uncovered more and more archaic sources that were very different from biblical and Roman law. To be sure, the appearance of new sources did raise some doubts: Even Jhering's version did not at first command unqualified assent among the best scholars of the later nineteenth century. As new sources were uncovered in the period after Jhering wrote, scholars were still open to other routes of interpretation. Thus in the 1880s, even as Josef Kohler and others were presenting the self-help model as established fact,<sup>107</sup> the model had not yet fully established its authority among other thoughtful scholars. We can thus see how slowly full acceptance came in the first efforts to interpret the newly-discovered Cretan Laws of Gortyn by Franz Bücheler and Ernst Zitelmann.<sup>108</sup> More importantly, we can see the same slowness to accept the self-help model in the great work of the 1880s on the religious background to Jewish law, published by William Robertson Smith<sup>109</sup> and Julius Wellhausen,<sup>110</sup>

105. *Id.* at 137.

106. *Id.* Although I focus narrowly here on Jhering's influence on the self-help model, a full account would also discuss his subtle, if less influential, observations on religion. See *esp. id.* at 277-78.

107. See in particular Kohler's lively book, tailored for a wide audience, JOSEF KOHLER, SHAKESPEARE VOR DEM FORUM DER JURISPRUDENZ 131 (1883). For a collection of similar views from authorities of the period, see the material discussed in B. VLAVIANOS, ZUR LEHRE DER BLUTRACHE 14-15 (1924).

108. FRANZ BÜCHELER & E. ZITELMANN, DAS RECHT VON GORTYN 44-45 (1885).

109. W. ROBERTSON SMITH, LECTURES ON THE RELIGION OF THE SEMITES (1889).

110. J. WELLHAUSEN, PROLEGOMENA ZUR GESCHICHTE ISRAELS (1883).

who offered accounts of the biblical regulations that were in some ways quite different from the accounts of Michaelis and Saalschütz. These scholars paid attention to the same comparative Arab material that Michaelis used, and they too continued to see a vengeance system as hanging in the background of the biblical law. But they were much more alive to the ritual meanings of the law than Michaelis or Hegel had been. Thus, Robertson Smith in particular analyzed the system of money penalties as closely linked to the system of sacrifice: Atoning payments were made, not only to human victims of violence, but also to the gods.<sup>111</sup> Both Robertson Smith and Wellhausen, steeped in pre- and non-Christian religious evidence, pointed the way to interpretations that focused on sacrificial and ritual meanings that could never have played any role in the work of any legal historian who started from Hegel's theology of Christian dogmatic abstraction. If Robertson Smith and Wellhausen had had the kind of impact that Michaelis did, legal history would be very different today.

But the ideas of Robertson Smith and Wellhausen did not, in the end, play any immediate role; the 1880s marked only a slowing in the progress of the self-help model. By the turn of the century, the self-help model had solidly established itself under the influence of Jhering (as well, perhaps, as the influence of Kohler).<sup>112</sup> It is especially fateful that the self-help model made its way into the interpretations of the rise of criminal law in the massive comparative compendiums of the turn of the century: the works not of Kohler, but of Post<sup>113</sup> and Steinmetz<sup>114</sup> as well—fateful, because comparative work of the ambition and scope of that period would never be done again. It is true that not everything was as it was with Jhering: If Jhering remained influential, the influence of Hegel waned somewhat by the turn of the century; and the Hegelian bent of earlier nineteenth-century legal history was no more to be discerned. Turn of the century accounts of the origins of law and the state no longer revolved quite so expressly around the development of subjective legal consciousness.<sup>115</sup> But if

111. SMITH, *supra* note 109, at 378-79.

112. E.g. 1 JOSEF KOHLER & LEOPOLD WENGER, *ALLGEMEINE RECHTSGESCHICHTE* 36-45 (1914). But, it should be noted that these scholars were much too learned not to discuss a host of other interpretive points as well.

113. 1 ALBERT H. POST, *GRUNDRISß DER ETHNOLOGISCHEN JURISPRUDENZ* 9 (1894-95). Strikingly, Post, in Jheringian language, gave the instinct to vengeance here only as an "example" of the universal original "Rechtsgefühl."

114. SEBOLD R. STEINMETZ, *ETHNOLOGISCHE STUDIEN ZUR ERSTEN ENTWICKLUNG DER STRAFE* (1928) (1894).

115. Thus Steinmetz in particular tried to develop a new analysis of the sources of primitive vengeance practice, which he traced to the cult of the dead. See 1 *id.* at 141.

the Hegelian philosophical underpinnings had vanished, the basic outlines of the theory remained.

In particular, it has to be said, scholars remained poorly equipped to think about the nature of the early state. Thus Father Scheil's 1902 publication of the Stele of Hammurabi stirred numbers of excited interpretations that showed both how thoroughly the self-help model had established itself, and how willing scholars had become, as a result, to operate without any clear compass in discussing the state's role in the making of these legal monuments. Stanley Cook's 1903 *The Laws of Moses and the Code of Hammurabi*, for example, recited the self-help narrative, with its Hegelian transition from talion to money penalties, as well-established truth about archaic societies.<sup>116</sup> To the extent that the newly-discovered Laws of Hammurabi seemed, with an oddly assertive state, to deviate, that simply called for expressions of surprise. And to the extent that the Code showed some very noticeable associations of body mutilation with social standing, those did not call for any effort at analysis at all:

The legal principles of the Code of Hammurabi viewed in light of the foregoing [i.e. the self-help model] are particularly striking. The primitive law of the *talio* has undergone certain modifications. It is rigidly enforced, and the exceptions are made chiefly in those cases where the victim is on a lower standing than the assailant. But revenge is not admitted; everything is under the supervision of the legal authorities . . . .<sup>117</sup>

This was interpretation, in some measure, against the sources. The 1904 commentary of Josef Kohler and his collaborator F.E. Peiser showed the same scholarly tendency. The self-help model *had* to offer the ultimate explanation of the stele—even though the text, far older than the Roman or biblical sources, displayed too much state activity, and therefore sat uneasily with the model:

The penal law is a thoroughly *state-based penal law*, there is as good as nothing of blood vengeance and composition to be seen *any longer* [emphasis on "any longer" mine].<sup>118</sup>

The model had begun to overwhelm the sources.

I have elsewhere traced some of the strength of the model in the early twentieth century, and in particular its powerful presence in the thought of Max Weber.<sup>119</sup> In our own day, the self-help model remains largely as it was at the turn of the century; strange as it is to say,

116. STANLEY A. COOK, *THE LAWS OF MOSES AND THE CODE OF HAMMURABI* 257 (1903).

117. *Id.* at 259-60.

118. 1 *HAMMURABIS GESETZ* 126 (Josef Kohler & Felix E. Peiser eds., 1904).

119. Whitman, *supra* note 11.

we can often skip several generations of scholarship without feeling at all disconcerted by what we find. Any number of texts could be cited; but we may take as an example one of the most learned of recent publications in legal history, Reinhard Zimmermann's *The Law of Obligations*:

At a time when State authority was still too weak to enforce law and order, and either to administer criminal sanctions or to develop a system according to which a wronged party, the individual had to take the law into his own hands. Whoever had committed a wrongful act against the body or property or another person was exposed to the vengeance of the victim of this wrong. The wronged party gained a right of seizure over the body of the wrongdoer, in order to execute his vengeance.

Initially this execution took the harshest possible form, namely the infliction of death. It is obvious that for the community at large such a state of affairs in which its members were allowed to kill each other was hardly satisfactory. Soon, therefore, we find the State interfering. . . . In the case of *membrum ruptum*, the *lex talionis* took the place of killing: if the wrongdoer had broken the victim's limb, the victim was allowed only to break the wrongdoer's limb in return—to let him inflict a graver injury than he had received himself now seemed to be excessive satisfaction. However, taliation (even though historically introduced as a means of mitigation) was still a relatively crude way of dealing with the consequences of wrongful acts. Therefore, already at a time before the XII Tables were drafted, the victim's right to vengeance was made redeemable: at first he was allowed, later expected, and finally indirectly forced, to accept a composition consisting of a sum of money (earlier on, probably cattle) which either the wrongdoer himself or somebody else—usually a relative—might offer in order to make the victim abstain from taking vengeance. This was a development which the State tried to support by standardizing the amount of the composition for various delicts.<sup>120</sup>

Professor Zimmermann, with his characteristic learning and elegance, gives here a ripe and well-considered version of the model—but one that still carries the marks of its Hegelian birth, with its focus on the evolution of consciousness and its casual account of the rise of the state. The self-help model of the early nineteenth century is still very much with us.

120. REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 2-3 (1990). For a more moderate and probing view, taking issue with some of the tradition of Jhering (and showing a welcome recognition that archaic law must have involved claims of right rather than assertions of might), but retaining the general form of the self-help theory, see WIEACKER, *supra* note 10, at 251.

## III

So we stand today, with a thoroughly pervasive self-help model guiding our interpretations. Nevertheless, qualms have introduced themselves into the minds of scholars from a variety of specialties. Indeed, qualms have introduced themselves into the minds of scholars of just about every *individual* specialty, as we shall see. But those qualms are never brought together under any single comparative banner. This is no surprise: Few scholars today have the Victorian self-confidence and diligence necessary to survey large numbers of legal traditions as a Kohler or a Post did.

Nevertheless, it is important to review the various objections mounted against the self-help model together; for in many ways they converge. In particular, critics of the self-help model have tended, in one fashion or another, to mount the same objection, although they mount it in isolation from each other and in different forms: They have tended to object that the self-help model is anachronistic. The model, its critics have sensed, fails in its self-appointed Hegelian task of reconstructing the archaic legal mentality. For in point of fact that mentality was much more profoundly different from ours than the model supposes.

To be sure, not all objections have taken this fundamental tack. Some scholars have raised objections that still move within the basic universe of the self-help tradition, with its focus on the relation between talion and composition. Thus Geoffrey MacCormack, a specialist in Roman law (though one with a rare willingness to take a broad anthropological perspective), has come to the same conclusion that Michaelis had come to fifty years before Hegel ever took the great problem on: Talion and composition are likely not two stages of development, but rather exist simultaneously, with composition representing the option to ransom one's limbs.<sup>121</sup> Raymond Westbrook, reasoning from ancient Near Eastern sources, has detected reasons to believe the same thing.<sup>122</sup> These authors independently arrive at the same powerful conclusion, one that I hope is bolstered by the intellectual history I have told here. Some sort of vengeance system very probably does lie in the background of the archaic sources. But in the dynamic of that system, it is likely that money compensation and ta-

121. Geoffrey MacCormack, *Revenge and Compensation in Early Law*, 21 AM. J. COMP. L. 69 (1973).

122. WESTBROOK, *supra* note 49, at 36-38. This view was already to be found, and indeed in a sophisticated form, in Antiquity. See AULUS GELLIUS, NOCTES ATTICAE 20.1.38 (1968).

lionic mutilation always co-existed. At least where talionic mutilation existed, there must also have existed a ransom option.<sup>123</sup> Hegel deceived us on this point.

But Westbrook and MacCormack, important though the argument that they make, in some sense still hew to the self-help model. They still think in terms of a world in which the early state clamps down on vengeance. Other scholars have moved further away, seeing more fundamental flaws in the self-help model. David Cohen, for example, the specialist in Greek law, sees the idea of an early state limiting violent vengeance as anachronistic.<sup>124</sup> Modern scholarship on ancient Greece makes this postulate of the self-help model implausible: The assumption that the early state was in fact committed to the eventual monopolization of social violence does not fit the picture of life in Greek city-states painted by knowledgeable historians. For in those city-states violence was acceptable and widespread.<sup>125</sup> Cohen's is a point with obvious force, and it is one that can be broadly extended.<sup>126</sup>

Nor is Cohen by any means the only scholar to communicate the uneasy sense that the picture of the early world assumed by the self-help model is seriously anachronistic. Advances in our understanding of antiquity over the past few generations have been such that thoughtful ancient historians inevitably experience doubt about the truth-value of the self-help model. In particular, a number of important scholars have wondered, as Robertson Smith already wondered a

123. This is also true if we imagine money fines, not as compositions, but as payments to the state. For evidence that mutilation punishments imposed by the state could be bought off by defendants in the later Middle Ages, see G. Gudian, *Geldstrafrecht und peinliches Strafrecht im späten Mittelalter*, in *RECHTSGESCHICHTE ALS KULTURGESCHICHTE. FESTSCHRIFT FÜR ADALBERT ERLER* 273-88 (1976).

Two other points should be noted on this topic. First, Arthur S. Diamond, using Near Eastern sources, has argued that the supposed sequence of development from talion to composition reverses the true order: that there was a sequential development, but that it ran from composition to talion. Arthur S. Diamond, *An Eye for an Eye*, 19 *IRAQ* 151 (1957). It is also important to note that if we accept Maussian theory, it seems impossible that talion as such could have arisen in any primitive vengeance system: For vengeance systems, like other systems of gift-exchange, should not allow for the possibility of an equivalent exchange that brings the relationship of the parties to an end. See MARCEL MAUSS, *THE GIFT* (1967). The best Maussian hypothesis would surely be that talionic equivalence only appears as a generalization from money equivalence.

124. On this point, see also Whitman, *supra* note 11.

125. DAVID COHEN, *HONOR, FEUD AND LITIGATION IN CLASSICAL ATHENS*, *ZEITSCHRIFT DER SAVIGNY STIFTUNG FÜR RECHTSGESCHICHTE (ROMANISTISCHE ABTEILUNG)* 100, 109 (1992).

126. Whitman, *supra* note 11.



century ago,<sup>127</sup> whether our focus on vengeance has not blinded us to mysterious winds of archaic religion moving through our sources.

Here there have been, we may say, two independent schools of thought, one French and one German. The French tradition can be traced back to the pioneering work on the social meaning of religion of Durkheim<sup>128</sup> and Mauss.<sup>129</sup> But more important for our purposes is the more technical legal historical work of two scholars of the immediate pre-war years, Henri Lévy-Bruhl and Pierre Noailles. Lévy-Bruhl and Noailles in a sense accepted the Hegelian methodological assumption that the problem of archaic legal history is the problem of reconstructing archaic subjective legal consciousness. But they rejected Hegel's odd account of that consciousness, in which archaic human beings pursued "subjective" self-interest without much noticeable trace of an archaic religious mentality. Thus, as Lévy-Bruhl pointedly put it, "Projecting myself at all times back into the milieu of these very ancient Romans, it has seemed to me impossible to interpret their institutions without taking account of the religious, or even magical, atmosphere, that surrounds and impregnates them."<sup>130</sup> Noailles spoke similarly.<sup>131</sup> To both French authors, it seemed clear that the various mysterious institutions of early Roman private law involved, not so much a system of primitive vengeance, as a religious system tied to the invocation of the aid and intervention of the gods. In particular, Roman procedures that Jhering had interpreted as staged battles, as survivals of a violent state of nature, were in fact invocations of divine decision-making comparable to ordeals, or magical declarations of right.<sup>132</sup>

Objections of a similar tenor were also independently developed by what we might dub the German school of the Weimar period, which included scholars working on Germanic and Greek sources. Particularly influential were the claims made, on the basis of Germanic sources, by Karl von Amira, in his 1922 *Germanic Death Penalties*.<sup>133</sup> This study carried Amira through a mass of comparative<sup>134</sup>

127. See *supra* text accompanying notes 109-11.

128. See EMILE DURKHEIM, *DE LA DIVISION DU TRAVAIL SOCIAL* 37 (4th ed. 1922) (1893).

129. See Marcel Mauss, *La Religion et les origines du droit pénal d'après un livre récent. Critique du livre de M. R. Steinmetz*, in 2 *OEUVRES* 677 (1968-69).

130. HENRI LÉVY-BRUHL, *QUELQUES PROBLÈMES DU TRÈS ANCIEN DROIT ROMAIN (ESSAI DE SOLUTIONS SOCIOLOGIQUES)* 9 (1934).

131. PIERRE NOAILLES, *DU DROIT SACRÉ AU DROIT CIVIL. COURS DE DROIT ROMAIN APPROFONDI* 80 (1949).

132. This is especially true of Noailles. *Id.* at 80-87; see also LÉVY-BRUHL, *supra* note 130, at 171.

133. Amira, *supra* note 43.

material in an effort to answer the momentous question of whether early Germanic death penalties, far from reflecting an evolution of self-help, did not in fact represent a form of human sacrifice. Did not the death penalty, with all its weird forms of beheading, hanging and the like, begin as human sacrifice? It did. It was accordingly not true that archaic Germanic material represented a spontaneous order of private vengeance; there had clearly been a system of public executions with cultic sacrificial meaning.<sup>135</sup>

Amira's idea that the key to understanding the archaic sources lay in sacrifice-based religion also suggested itself, in one form or another, to other Weimar scholars.<sup>136</sup> Kurt Latte's 1920 dissertation, *Sacred Law*, focused on early Greek practices of paying temple fines as a way of resolving legal disputes.<sup>137</sup> A similar approach marked one of the most striking works of the Weimar period, one again founded principally on Greek material: Bernhard Laum's 1924 *Sacred Money*.<sup>138</sup> Laum's work took, as its starting point, the familiar fact that accounts in archaic societies are typically reckoned in animals—indeed, in precisely the animals that are ordinarily used in sacrifice. Only relatively late does “money” appear, and it retains its notional connection with animal-based reckoning for a very long time. From these facts, Laum built his noteworthy account of the sacred origins of money, as deeply connected with sacrifice practices. As for composition in early legal systems: It was intimately related to the making of expiatory sacrifices.<sup>139</sup>

Taken together, these Weimar scholars presented a typically German approach, one that varied in some important ways from the French approach of Lévy-Bruhl and Noailles. The French scholars

134. *Id.* at 5.

135. *Id.* at 198. Though only “Aryan”! Cf. also already Jhering's observations, JHERING, *supra* note 101, at 278.

136. This idea, it should be noted, had also been anticipated in a footnote by no less than Jacob Grimm. See 2 JACOB GRIMM, *DEUTSCHE RECHTSALTERTÜMER* 237 n.\* (1983) (1899) (“der zusammenhang des buße und sühne mit dem *opfer* läßt nicht zweifeln, daß auch beziehungen zwischen den sühn- und opferthieren der Griechen und Römer und unsern wergeldern in vieh oder getraide vorhanden sind.”).

Doubts about the self-help model were also expressed by a number of specialists in Germanic sources in the first part of this century whom I do not discuss here. See the survey of views in G. RADBRUCH, *DER URSPRUNG DES STRAFRECHTS AUS DEM STANDE DER UNFREIEN*, in RADBRUCH, *ELEGANTIAE IURIS CRIMINALIS. VIERZEHN STUDIEN ZUR GESCHICHTE DES STRAFRECHTS* 1-4 (2d ed. 1950).

137. KURT LATTE, *HEILIGES RECHT. UNTERSUCHUNGEN ZUR GESCHICHTE DER SAKRALEN RECHTSFORMEN IN GRIECHENLAND* 48 (1920).

138. BERNHARD LAUM, *HEILIGES GELD. EINE HISTORISCHE UNTERSUCHUNG ÜBER DEN SAKRALEN URSPRUNG DES GELDES* (1924).

139. *Id.* at 40-80.

imagined, or tended to imagine, a world of the magical invocation and summoning of the gods: a world of spells and ordeals. The Germans, by contrast, tended to imagine a world of expiation, a world in which the gods prescribed complex acts of ritual sacrifice. These were two importantly different pictures of the archaic legal world, pictures that implied two different approaches to the understanding of ancient concepts of law, of guilt, of justice.

But the differences between French and Germans do not diminish the principal point, which is that both schools attacked the self-help model (though without ultimately shaking its grip). Scholars working in separate fields, and in two different national pre-war traditions, had come to doubt the self-help model because they doubted that it did justice to archaic religious practices—archaic religious practices which, by their nature, tend to escape the view of Christian scholars.

In the same way, scholars in yet other fields, and of yet other nationalities, have come, especially in the post-war period, to doubt the dogma of state reactivity. In particular, they have come to doubt Jhering's idea that our "codes" are nothing more than collections of precedent.<sup>140</sup> The most elaborate and important argument of this kind was mounted by the Assyriologist F.R. Kraus, in a well-known article that, on the basis of grammatical resemblances, argued that the Laws of Hammurabi represent a "scientific" treatise comparable to those in ancient Near Eastern medicine or astrology.<sup>141</sup> Its aim was not the reactive one of collecting the material of precedent, but the systematic one of ordering the law. The Assyriologists are not alone in experiencing this kind of doubt. Scholars of the Twelve Tables, too, have found it difficult to view their source as simply some collection of precedents.<sup>142</sup> This problem has most recently been addressed by André Magdelain, who expresses doubt about accounts of the Twelve Tables that make them out simply to have dealt with isolated issues. Their goal, he observes, was "not so limited": They set out to offer an exhaustive account of the law.<sup>143</sup> Arguments of the same type are eas-

140. See *supra* text accompanying notes 105-06.

141. Fritz R. Kraus, *Ein Zentrales Problem des altesopotamischen Rechtes: Was ist der Codex Hammurabi?*, 8 GENAVA (N.S.) 283, 283-96 (1963); see also JEAN BOTTÉRO, *MESOPOTAMIA: WRITING, REASONING AND THE GODS* 156 (Zainab Bahrani & Marc van de Mieroop trans., 1992); WESTBROOK, *supra* note 49, at 2-8.

142. See the discussion of ALAN WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* 185-86 (1975), and the literature cited in FRANZ WIEACKER, *RÖMISCHE RECHTSGESCHICHTE* 295 n.53 (1988).

143. André Magdelain, *Les XII tables et le concept de ius*, in ZUM RÖMISCHEN UND NEUZEITLICHEN GESETZESBEGRIFF 19 (Okko Behrends & Christoph Link eds., 1987). On the question

ily mounted about the extraordinarily elaborate Germanic codes, which seem so clearly systematizing in spirit. All of these objections bear, I take it, an obvious and important conceptual relation to the objections of Lévy-Bruhl, Noailles, and Amira just discussed: They tend to paint a picture of our early sources as produced, not by a "state" arbitrating talionic feuds and noting its judgments, but by some set of authorities concerned to order the law systematically—whether we would say "scientifically" or theologically.

#### IV

It is to these objections, raised by voices in the wildernesses of so many scattered fields, that I now want to add my own, focusing more directly on the blindspots of the self-help model whose history I have traced. I should emphasize that my purpose is purely to be critical. I will not attempt to develop any alternative model—something that would burst the bounds of this brief Article. I will simply try to let a glancing light sweep over the material the self-help model fails to explain.

We have seen how the self-help model developed. By focusing on talion and composition, and by imagining a reactive state that arose in the effort to supervise a spontaneous order of vengeance, the makers of the model built an elegant, and indeed a beautiful, account of the history of law. It is an account that has captured some of the greatest minds of the field, and that served to inspire much of the political sociology of Weber, and indeed much of the legal philosophy that begins from the idea of a "monopoly of violence."

But is it an adequate account?

The first doubts we should bring to the self-help model are the doubts implicitly encouraged by the arguments of Kraus and others about the "scientific" character of our codes; for those arguments raise source-critical issues with far-reaching implications for the model. As we have seen, the self-help model was developed principally in the discussion of archaic codes—most especially of the Book of the Covenant, the Twelve Tables, and the Germanic Barbarian Codes, but also of other similar sources. Yet these codes are clearly more problematic sources than the makers of the self-help model acknowledged. In part this is because, as Professor Westbrook has re-

of the exercise of central power, see also P. Wormald, *Charters, Law and the Settlement of Disputes in Anglo-Saxon England*, in *THE SETTLEMENT OF DISPUTES IN EARLY MEDIEVAL EUROPE* 167 (W. Davies & P. Fouracre eds., 1986).

cently reminded us, we have not settled the elementary question of whether the similarities in these sources are the consequence of diffusion, independent invention, or some intermediate possibility.<sup>144</sup> But there is more to it than that. The archaic codes were produced by some kind of state-like authorities; and principles of source criticism would suggest that we must think long and hard about the aims and practices of those authorities before using the sources. Yet, as Noailles justifiably complained, it is precisely the aims and practices of the early "state" that have been most poorly discussed in the self-help tradition.<sup>145</sup> From Michaelis on, we have tended to rest content with the hypothesis that the codes were produced by an early state that was fundamentally reactive in character, and that can be completely described as having been intent on monopolizing violence.

Yet it is clear enough that there are other possibilities. The notion, in particular, that the early state was purely reactive leaves too many alternatives undiscussed. Undoubtedly the early "state"—or let us say, the "authorities" that produced our sources—did not engage in legislative innovation of the kind that exists today; but that does not mean that our sources simply list "precedents" in Jheringian fashion. Authorities, often closely connected with religious and temple functions as they were, may very well have aimed at all kinds of theological and cosmological ordering. We must approach this possibility with an open mind. And keeping an open mind means dropping the assumption that our baseline problem is the development of "subjective" legal consciousness, as reflected in the "precedential" notations of our codes. Keeping an open mind means posing seriously the question of the aims and "mentality," as it were, of the authorities that produced our codes—a very different question from any posed by the self-help model.

Consider, then, how little aid the model gives us in understanding how those authorities treated mutilation. As we have seen, our sources show a wide and fascinating range of provisions about bodily mutilation. The self-help tradition builds its reasoning on only *part* of this range of mutilation provisions: on talionic mutilation, which it assumes to derive, in one way or another, from a widespread mutilatory vengeance order in the state of nature.

144. Raymond Westbrook, *The Nature and Origins of the Twelve Tables*, 105 ZEITSCHRIFT DER SAVIGNY STIFTUNG (ROMANTISTISCHE ABTEILUNG) 74, 74-121 (1988).

145. NOAILLES, *supra* note 131, at 83.

Yet it cannot be said that *all* the provisions on mutilation in our early sources have to do with vengeance; and today, two centuries after Michaelis wrote, larger issues suggest themselves with too much force to be ignored.<sup>146</sup> Thus, at the very least, we should be willing to cast an eye upon sacrificial practices whose centrality has been noted by so many ancient historians;<sup>147</sup> for much early mutilation regulation clearly involves ritual practices that are very strange to us, and that play no role in the self-help model.<sup>148</sup> It is worth bearing in mind that the society that produced classical Roman law was also a society that produced wisdom like the following:

A priest whose body is not whole is a thing to be shunned, like a bad omen. Sacrificial victims are considered blameworthy for this [i.e., having defective bodies]; how much more so a priest? After a man has become a priest, he must be watched even more carefully for disability; for priests do not become maimed unless the gods are angry.<sup>149</sup>

We cannot read of people knocking each other's eyes out; of slaves being branded or having their ears sliced; of enemy corpses being mutilated; of "parts" being cut from debtors; without some sense of the complex religious meanings that are often attached to disfigurement in societies different from ours. We cannot rest content with accounts that still, in the casual fashion of Michaelis, assume "that in the state of nature every man has a right to take revenge at his own hand for

146. Indeed, the human body is a very eagerly studied subject among non-lawyer specialists in early human society. As Mary Douglas wrote almost thirty years ago in her *Purity and Danger*:

The structure of living organisms . . . reflect[s] complex social forms . . . . So we find that the rituals of sacrifice specify what kind of animal shall be used and that these rules signify various aspects of the situation which calls for sacrifice. The way the animal is to be slaughtered is also laid down . . . . Even more direct is the symbolism worked upon the human body. . . . We cannot possibly interpret [a variety of] rituals . . . unless we are prepared to see in the body a symbol of society, and to see the powers and dangers credited to social structure reproduced in small on the human body. It is easy to see that the body of a sacrificial ox is being used as a diagram of a social situation. But when we try to interpret rituals of the human body . . . .

MARY T. DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* 137-38 (1970). We need not follow every lead that anthropologists give us, but we cannot ignore their conclusions either.

147. WALTER BURKERT, *HOMO NECANS: THE ANTHROPOLOGY OF ANCIENT GREEK SACRIFICIAL RITUAL AND MYTH* (Peter Bing trans., 1983); see, e.g., *THE CUISINE OF SACRIFICE AMONG THE GREEKS* (Marcel Detienne & Jean-Pierre Vernant eds. & Paula Wissing trans., 1989); RENÉ GIRARD, *LA VIOLENCE ET LE SACRÉ* (1972); and, among older works, especially Henri Hubert & Marcel Mauss, *Essai sur la nature et la fonction du sacrifice*, in 1 *OEUVRES*, *supra* note 129, at 193-354.

148. See *supra* text accompanying notes 128-39.

149. Seneca the Elder, *Controversiae* 4.2, in L. ANNAEUS SENECA MAIOR *ORATORUM ET RHETORUM SENTENTIAE, DIVISIONES, COLORES* 146 (Lennart Hkanson ed., 1989) (cited and discussed in WISSOWA, *supra* note 40, at 416 & n.3).

any deliberate personal injury, *such as the loss of an eye*,"<sup>150</sup> without asking *why* eyes were being knocked out. We must cultivate some larger sense of the socio-religious meanings of mutilation.

Nor is the issue narrowly religious. In particular, our sources raise provocative questions about mutilation and social standing. As we have seen, the archaic codes often reflect some kind of belief in a structural harmony between bodily mutilation and social standing, both in the sense that persons of very low social standing might routinely be mutilated and in the sense that malefactors of low social standing might more readily be mutilated than malefactors of high social standing.<sup>151</sup> This too belongs to a world undreamt-of by the self-help model—a world whose strangeness might best be brought out by meditating upon the remarkably comparable world described in Hulsewé's survey of the Qin penal system. Here is how the law looked, a half a world away, around the time of the Punic Wars:

The usual death penalty was beheading, called "casting away in the marketplace," *ch'i shih*. There also existed a death penalty called *che*, traditionally explained as "to be torn apart by carriages," but probably meaning "to be executed and exposed," but apparently not identical with "quartering." It is unknown how far this was the same as *sheng lu*, "dishonouring while alive," explained in the present text as "first dishonouring and then cutting asunder". . . .

Persons condemned to hard labour were often also subjected to mutilating punishments; these mutilations never appear in isolation, but they are always combined with hard labour. The heaviest of the hard labour punishments was that of the "wall builders" . . . .

These wall builders could be *wan*, "whole; intact," i.e. not subjected to mutilation, or they could be condemned to suffer a mutilating punishment in addition. The heaviest of these mutilations was the amputation of both feet . . . . One degree less was cutting off the left foot . . . . Again one degree less was cutting off the nose . . . .

All wall builders, including those who had not suffered a mutilating punishment, had their hair and their beard removed. [This practice] is mentioned in articles dealing with fathers or masters who had on their own authority "killed, mutilated *or shaved*" their children or their slaves. A stone engraving from a Later Han tomb shows people (slaves or criminals) having their hair cut off.

The hard labour convicts condemned to an additional mutilation (perhaps tattooing . . .) also had their beard shaved off. This is shown by the case of a man with privileged status, who had committed a crime "warranting mutilation and being made a bond servant,"

150. Quoted at *supra* text accompanying note 69 (emphasis added).

151. See *supra* notes 37-39 and accompanying text.

for in his case an order was given "do not mutilate him, but apply the shaving of the beard."<sup>152</sup>

We have an obligation to ask ourselves what all this is about, in the various societies in which it and the like appear. Yet the issue of mutilation and social standing has been badly obscured by the self-help model.<sup>153</sup> Our sources reveal a complex mental world in which bodily perfection was linked both to central religious ceremonies and some sort of map of the social hierarchy. It is a great failing in the self-help model that it blinds us to those facts.

It bears emphasizing that we can consider this alien world of mutilation practices without shutting the issue of vengeance out: There is no need to argue that the self-help model has no elements of truth. In particular, the idea that bodily imperfection brings diminished social standing or cultic impurity is not, as such, irreconcilable with the postulate of a system of primitive mutilatory vengeance. We can imagine a system of primitive vengeance (and war) in which combatants mutilated each other precisely in order to render each other ritually impure and socially demeaned. But we should note that imagining such a system carries us far away from the primitive vengeance mentality postulated in the Hegelian tradition I have traced—and far closer to some kind of archaic mentality with very different suppositions from our own.

Most importantly, imagining such a system carries us far away from the picture of the early "state" sketched by Michaelis or Jhering. For the mutilation provisions we see do not, as such, imply that any early state was engaged in suppressing, or even supervising, vengeance-violence in any systematic way. On the contrary, on their face, these provisions do nothing more than order and organize a system of mutilation only some of which had to do with vengeance. On their face, these sources establish a system of mutilation for a variety of purposes, some of them involving vengeance, some involving social standing, some involving cultic purity, some involving what must be called "public" punishments aimed at furthering the ends of, often, distinctly aggressive authorities.

152. HULSEWÉ, *supra* note 30, at 14-16 (Chinese characters omitted).

153. Even though one leading thinker, Gustav Radbruch, thought that this issue offered the key to the development of criminal law:

Forms of punishment that once were applied only to members of the servant-class made their way later into general criminal law. Above all mutilation penalties: early on imposed almost only on unfree persons, in the Carolingian period they are more and more applied to free persons . . .

RADBRUCH, *supra* note 39, at 5.



The hypothesis that lies nearest to hand is thus, *not* that our sources were created by Weberian states aborning, determined to supervise, in a reactive way, the vengeance-violence of a state of nature. The hypothesis that lies nearest to hand (though it is one that I clearly do not adequately explore here) is that our sources were created by authorities that aimed first and foremost to bring ritual and social order to societies that set great store by the intactness of the human body.

## V

Let me now press on to glance at money penalties, which, carefully considered, raise problems closely akin to those raised by mutilation.

Here too, we must begin by recognizing that our self-help model has only dealt with a part of the archaic record. Composition is surely to be found in the widest variety of sources. But in point of fact, composition is not a general category of primitive regulation; like talionic mutilation, composition is a *sub*-category of a broader and more widespread category—in this case the category of price-setting and market policing.

Indeed, if we had begun the work of interpretation from our very earliest Near Eastern sources (sources that were as yet unknown to Michaelis, Hegel, and the legal historians of the mid-nineteenth century), we might well have begun by assuming that the earliest activity of the state involves, not the supervision of violence, but the setting of prices; for it is with the setting of prices and wages that those sources are largely concerned.<sup>154</sup> To be sure, the pattern of price-setting does seem to undergo change in the later sources. In particular, the concern in the later sources seems to revolve around setting prices for the animals that typically serve both as exchange media and as sacrificial victims.<sup>155</sup> This obviously raises some important problems; but it does not diminish the truth of the proposition that price-setting, in the early codes, is a wider-ranging phenomenon than our many discussions of composition would suggest.

Once again, of course, the fact that composition forms only a part of a larger category of price-setting does not, as such, imply that the self-help model is entirely wrong. Composition provisions may well

154. See *supra* notes 55-57 and accompanying text.

155. See again the studies of PERUZZI, *supra* note 63 & HATTENHAUER, *supra* note 13, at 19-20.

have aimed to control some system of vengeance; just as talionic mutilation may well have been integrated in a system of vengeance. But the fact that price-setting extends beyond composition alone does have an important implication, once more, about the limits of the self-help model *as an adequate account of the aims of the early "state."* The archaic codes seem, on their face, to have been produced by authorities whose *overarching* aim, with regard to the money economy, was not to control a system of vengeance, but to set a system of prices. The concern of the early state as price-setter, on some level, it seems reasonable to hypothesize, was not first and foremost the control of violence, but the control of payments in money and weighed metal.

Fleshing this point out in full would require much more detailed work on archaic institutions than I can offer in this Article, whose primary purpose is to complain about the failings in what has been said, rather than itself to say anything definite. Primitive money is simply too difficult a topic to treat here. But it is important to say at least this: On their face, the archaic codes belong, not to a modern world characterized by the policing of the streets, but to a pre-modern world characterized by the deeply felt need to set just prices. What early authorities arguably clamped down upon was, not violence, but the market; the great issue was not safety in the streets, but the ever-mysterious psycho-social dynamic of money—a dynamic easily linked to magico-religious beliefs. And it is worth observing that focusing on that mysterious psycho-social dynamic would allow us to build interpretations that draw more fully on the work of some of our greatest scholars—not only on the work of David Daube,<sup>156</sup> but also perhaps on the work of Nietzsche, who has never gotten much due from legal historians.<sup>157</sup>

It is perhaps also worth observing that focusing on the psycho-social dynamic of money might allow to give someone else his due: Hegel. Understanding why the early state sought to set prices would, after all, require that we understand a prior and far deeper problem: Why it is that anyone would ever accept payment in metal for any-

156. See 2 DAVID DAUBE, *Money and Justiciability*, in COLLECTED STUDIES IN ROMAN LAW 1341-55 (1991).

157. See FRIEDRICH NIETZSCHE, ZUR GENEALOGIE DER MORAL 2nd essay, Section 4:

Woher diese uralte, tiefgewurzelte, vielleicht jetzt nicht mehr ausrottbare Idee ihre Macht genommen hat, die Idee einer Äquivalenz von Schaden und Schmerz. Ich habe es bereits verrathen: in dem Vertragsverhältnis zwischen *Gläubiger* und *Schuldner*, das so alt ist als es überhaupt 'Rechtssubjekte' gibt, und seinerseits wieder auf die Grundformen von Kauf, Verkauf, Tausch, Handel und Wandel zurückweist.

F. Nietzsche, *Sämtliche Werke. kritische Studienausgabe*, 15 BANDEN 278 (Giorgio Colli & Mazino Montinari eds., 1967-77).

thing. In a sense, Hegel may have been right about his fundamental problem of legal history, much though he may have played the villain in this particular Article. The real difficulty in understanding the early codes, arguably, is understanding the origins of the idea of value-equivalence. The most difficult mystery of the early codes is: Why do humans ever regard weighed metal as the equivalent of anything?

## VI

My goal in reciting all this is, however, not to solve any such great mystery, but to point out that mystery exists in our early sources, and to argue that we have largely missed the existence of this mystery because we (or most of us) have assumed that the self-help model explains too much. To be sure, the self-help model does seem to explain some of our source material. The idea that some kind of private vengeance order lies in the background of the archaic codes is too plausible, and too revealing, to be abandoned. It must surely be correct that the authorities that erected the bronze tables and the diorite steles upon which the early codes are inscribed meant, *in part*, to meddle in a system of vengeance.

What is, however, not clear is that these authorities did their meddling because it was their fundamental aim to clamp down on violence in the style of a nineteenth-century Northern European state that is best analyzed by means of some version of the social contract or self-help theories. On the contrary: It seems, at least at first glance, more plausible that the early authorities meddled as a way of setting magico-religiously, or "scientifically," proper rates, both as concerns prices and as concerns dismemberment. The most attractive starting hypothesis is that the codes that have come down to us were produced not in the course of a typically nineteenth-century campaign to clamp down on violence, but in a much more alien archaic effort to control the marketplace and to deal with the problems of body mutilation in a world of sympathetic magic and ritually-ordered social hierarchy.

Now, to say that leaves open, of course, all of the most important questions about our sources. It leaves open the very difficult question of whether the similarities in our sources are ultimately owing to diffusion or independent invention or some mix of both. More broadly, it leaves open the questions that all comparative work leaves open: No comparative study can do more than indicate how we might proceed in treating particular traditions. Identifying similarities of the kinds we see in these codes can, in the end, only serve to focus our attention

on what might otherwise have been neglected details in our various sources. Real answers can only come from studying those details in their particularity.

Finally, it leaves open the great question, not only of the meaning of money and the meaning of mutilation, but of the relationship *between* money and mutilation. That was the question that the self-help model claimed elegantly to solve, by reducing money and mutilation to the narrower categories of composition and talion. This solution, I hope I have shown, fails; but the problem remains. It is of course possible that there is no relation whatsoever; money and mutilation may have no deep connection. But perhaps there are ways to show that a relation does exist: It is tempting, for example, to strike out anew on the path marked out by scholars working in a variety of fields in the scholarly ferment of the Weimar period—by Latte, by Amira, and most strikingly by Laum. In various ways, these authors linked early compensation payments, and early money, to the system of sacrifices to the gods. It might be revealing to exploit these theories of compensatory sacrifices in order to link our two great issues of mutilation and price-setting. *Both* mutilation and price-setting may in fact, at their origin, reveal a concern for maintaining proper cosmological order within a sacrifice-based religious system. But here again, this Article is not the place to do more than suggest possibilities that would carry us into profoundly difficult questions in the interpretation of sacrifice.<sup>158</sup>

What this broad glance at the sources suggests is, in the end, simply all that broad glances at the sources *can* suggest: directions for further research. It suggests that we might do well to attempt a different view of some particular institutions in some traditions. (Perhaps it suggests a new direction for philological argument as well, insofar as our standard etymologies for critical terms may assume the truth of the self-help model.<sup>159</sup>)

Finally, this Article suggests one more point—and for most modern legal scholars the most important point of all. To the extent we want to follow the lead of Max Weber, it argues for caution. Weber (like Jhering) built a very grand structure of argument on the self-help model of archaic legal history: the “monopoly of violence” model that

158. It is important to note that mutilation penalties and money fines could also, quite simply, stand in a kind of “ransom” relation like that described by Michaelis, Westbrook and McCormack. See *supra* text accompanying notes 71, 121-23.

159. Cf. KARL VON AMIRA, GRUNDRISSE DES GERMANISCHEN RECHTS 211 n.2 (3d ed. n.d.) (1960).

has had such impact on sociological and political thought. We are the inheritors, in fact, of a large, complex, and well-articulated tradition of social and legal theory that started out from the assumption that the "state" developed in the course of reactively supervising a primitive vengeance order. That assumption, I have tried to show, is shaky, at least as applied to our very oldest sources.<sup>160</sup> Whether the shakiness of this basic assumption of the "monopoly of violence" tradition matters is a point for discussion about the philosophy of sociology, or the philosophy of law, or political theory, not for a paper on Ancient Law—but let us note that it *is* a point for discussion.

160. I should however note that I have not claimed, and do not claim, that the "monopoly of violence" model is necessarily out of place in discussing *European* developments from the Central Middle Ages. On the contrary, there is clearly a case to be made that the model describes those developments well, especially in the context of German history. *Cf. supra* note 9.